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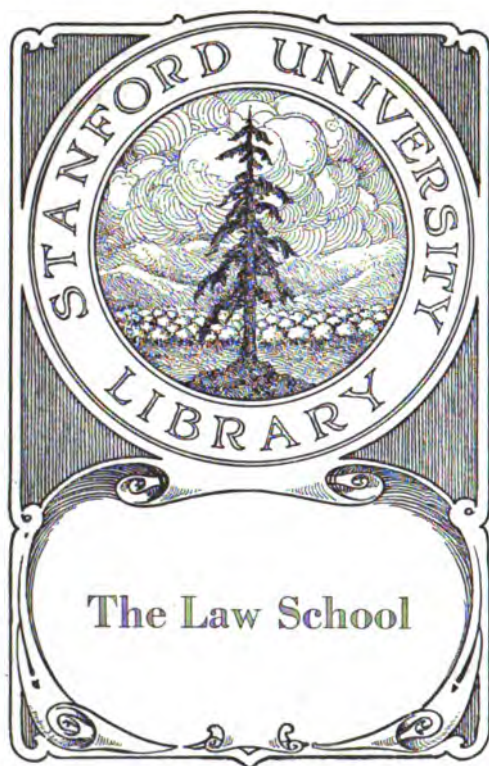
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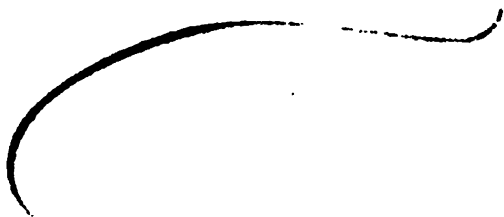




Henry H. Lapwing

February 27. 1869

السلامة من كل خطر  
والسلامة من كل خطر







**OFFICIAL OPINIONS**  
**OF**  
**THE ATTORNEYS GENERAL**  
**OF**  
**THE UNITED STATES,**  
**ADVISING THE**  
**PRESIDENT AND HEADS OF DEPARTMENTS**  
**IN RELATION TO THEIR OFFICIAL DUTIES,**  
**AND EXPOUNDING THE CONSTITUTION, TREATIES WITH FOREIGN**  
**GOVERNMENTS AND WITH INDIAN TRIBES, AND**  
**THE PUBLIC LAWS OF THE COUNTRY.**

---

**EDITED BY**  
**J. HUBLEY ASHTON.**

---

**VOLUME XI.**

**[PUBLISHED BY AUTHORITY OF CONGRESS.]**

**WASHINGTON, D. C.:**  
**W. H. & O. H. MORRISON.**  
**1869.**



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Entered according to act of Congress, in the year 1869, by  
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**VOLUME XI.**

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**CONTAINING**

**THE OPINIONS**

**OF**

**HON. EDWARD BATES,**

**OF MISSOURI,**

**HON. JAMES SPEED,**

**OF KENTUCKY.**



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# OPINIONS

OF

HON. EDWARD BATES, OF MISSOURI.

APPOINTED MARCH 5, 1861.

## CLAIM OF ELIZA B. BURR.

Eliza B. Burr intermarried with Colonel Aaron Burr, a revolutionary pensioner, and afterwards obtained a decree of divorce, absolutely dissolving the marriage. *Held*, that she was not entitled, on the death of Colonel Burr, to be placed on the pension roll as his widow.

ATTORNEY GENERAL'S OFFICE,

November 6, 1863.

SIR: I have received your letter of October 22d, relating to the claim of Eliza B. Burr, to be put upon the pension roll, *as widow* of Colonel Aaron Burr, deceased, who was a revolutionary pensioner.

It appears, by your letter, that Colonel Burr intermarried with the claimant (Eliza B.) July 1, 1833, and that afterwards, on the 8th day of July, 1836, upon the application of the said Eliza, filed in the Court of Chancery of the State of New York, charging Colonel Burr with adultery, she was, by a decree of that court, divorced. It appears, also, that the language of the decree of divorce is plain and comprehensive. It was not to effect any modification of the contract of marriage, nor to produce only a personal separation, but to destroy the bonds of matrimony. This is the language of the decree, as stated in your letter—"that the marriage between the said complainant and the said Aaron Burr be dissolved, and the same is hereby dissolved accordingly. And the said parties and each of them are and is free from all obligations thereof."

After this decree, on the 14th day of September, 1836, Colonel Burr died. And now, under these circumstances, the lady claims to be his widow, and, as such, to be put upon the pension roll.



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Cotton Picked Up at Sea.

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I do not see the legal possibility of doing it. A widow I understand to be a wife that outlives her husband. And if the decree of the New York court be legal and valid, (and it is not impeached,) it must be true that Mrs. Burr had no husband, and Colonel Burr had no wife, at and immediately before his death.

In my opinion, she is not his widow, and, therefore, not entitled to be put upon the pension-roll.

And as to the resolution of the House of Representatives, to which you refer, it does not, in my judgment, touch the merits of the claim.

I am, sir, very respectfully,

Your obedient servant,

EDWARD BATES.

Hon. J. P. USHER,

*Secretary of the Interior*

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COTTON PICKED UP AT SEA.

The Secretary of the Navy has not authority, in all cases, to direct distribution of the proceeds of cotton found floating at sea and picked up by vessels of the Navy.

ATTORNEY GENERAL'S OFFICE,

November 20, 1863.

SIR: I have the honor to acknowledge the receipt of your letter of the 7th instant, requesting to be advised whether the Navy Department has any authority to direct a distribution in cases where bales of cotton, floating at sea, have been picked up by vessels of the Navy.

It is difficult, if not impossible, to lay down any general rule to control the disposition of all cotton floating at sea, which may be picked up by our naval vessels. The rules proper to each case will depend on the peculiar facts of such case. But, I presume, that all such cotton will be in one of three classes:

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Cotton Picked Up at Sea.

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1st. It may be cotton thrown overboard by in enemy, or by a blockade-runner, in the attempt to escape capture, and taken with the vessel itself as prize. In this case, it should be judicially proceeded against as prize, as has happened, if I am not mistaken, in at least one instance, where both vessel and cotton were condemned by Judge Sprague, at Boston.

2d. Or it may be cotton washed or thrown overboard from our own or a friendly vessel, in circumstances of peril or distress, and rescued from loss by one of our naval cruisers. This, or the like, would present a case for the ordinary claim of salvage.

3d. Or, lastly, it may be a *maritime derelict*.

To constitute a *maritime derelict*, the property at sea must not only be abandoned, but the abandonment must be without hope of recovery. (2 Kent's Com., 357, and cases cited.) And when such derelicts are found, they are to be held by the general rule of civilized countries, perquisites or *droits* of the admiralty, subject to be reclaimed by the owner, but without any other claim on the part of the finder than to his reasonable salvage remuneration. (The Aquilla, 1 Rob. Adm. Rep., 32; 1 Hagg., 383; 2 Kent's Com., 258, note, and cases cited.)

What constitutes a reasonable salvage remuneration, is, of course, a question for judicial determination in each case.

I do not, therefore, perceive that in any case of cotton picked up by naval vessels at sea, the Navy Department has authority to direct distribution. And I would respectfully advise you against the exercise of such a power.

I am, sir, very respectfully,

Your obedient servant,

EDWARD BATES.

Hon. GIDEON WELLES,

*Secretary of the Navy.*

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Case of Steamer Hoboken.

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## CASE OF THE STEAMER HOBOKEN

The Attorney General has no power to give an official opinion on questions referred to him by the Secretary of the Treasury, at the request of the Third Auditor, for the guidance, not of the Secretary, but of the Third Auditor, in a case, under the act of March 3, 1849, chap. 129, which cannot come before the Secretary.

ATTORNEY GENERAL'S OFFICE,  
*November 10, 1863.*

SIR: On the 15th ultimo, the Hon. L. E. Chittenden, Acting Secretary of the Treasury, transmitted to me a statement from the Third Auditor of the Treasury, relative to a claim pending before that officer, for the value of the steamer "Hoboken," and, at the request of the Third Auditor, asked my opinion on certain questions arising on that claim.

I find, by reference to the statement of the Third Auditor, that this claim is pending before him under the fifth section of the act of March 3, 1863, chap. 78, which is an amendment to the act of March 3, 1849, chap. 129, (9 Stats., 414,) to provide for the payment of horses and other property lost or destroyed in the military service of the United States.

The last-named act provides a method of payment for horses and other property named, lost or destroyed in the military service of the United States, by any of the means specified in the first and second sections; and the fifth section of the act of 1863 declares that the second section of the act of 1849 "shall be construed to include steamboats and other vessels, and railroad engines and cars, in the property to be allowed and paid for when destroyed or lost under the circumstances provided for in said act."

The third section of the act of March 3, 1849, directs that the claims provided for under that act "shall be adjusted by the Third Auditor under such rules as shall be prescribed by the Secretary of War, under the direction or with the assent of the President," &c., and the fourth section provides "that all adjudications of said Auditor upon the claims above mentioned, whether such judgments

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Case of Steamer Hoboken.

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be in favor of or adverse to the claim, shall be entered in a book provided by him for that purpose, and under his direction; and when such judgments shall be in favor of such claim, the claimant or his legal representative shall be entitled to the amount thereof, upon production of a copy thereof, certified by said Auditor, at the Treasury of the United States."

It thus appears that the claim in this case belongs to a class of claims which are by law committed to the special jurisdiction of the Third Auditor, and to be disposed of by his judgment alone, under the rules prescribed by the Secretary of War, with the direction or assent of the President. And upon the judgment of the Auditor alone, the claimant, if that judgment be favorable, is entitled to payment, without any further proceedings than the production of a certified copy thereof at the Treasury. Whatever may be the power of the President, or Secretary of War, to control the judgment of the Auditor in any given case, under the terms of the statute, it seems clear that there can be no resort in any such case from the Auditor to the Secretary of the Treasury. The Auditor, by the terms of his authority, acts independently of his proper official chief, and I do not see how, in a case under the statute, there can be any appeal from his decision to the Head of the Treasury Department. It is not, therefore, a case in which it would be proper for me to give an official opinion.

In a letter to you, dated the 23d of October, 1863, I had the honor to express my views of the extent of the authority and duty of the Attorney General, in giving his official opinions, in the following language: "By long and unbroken construction and practice, it has been settled that the Attorney General acts, in performing this legal duty, simply as the law adviser of the President and Heads of Departments. He is bound, upon points of law and facts stated by them, to give legal opinions in aid of their judgment, in matters for their decision. \* \* \* \* \*

He is not the official legal adviser of any subordinate

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Case of Steamer Hoboken.

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officer of any department, except the Solicitor of the Treasury. It is true that he often gives to Heads of Departments advice and opinions upon questions arising in the bureaux of their respective departments, but such advice and opinions are intended to aid only the judgment of the Secretary himself in deciding such questions. To enlarge the rule beyond this extent, would not only be unwarranted by law, but would convert the Attorney General's office into a sort of general appellate court, where dissatisfied claimants might seek relief from adverse decisions, and subordinate executive officers find a way of escape from official labor and responsibility."

I have applied this rule to ordinary cases before the accounting officers, which might have been brought before the Secretary of the Treasury, but which, in fact, were not before him, my opinion being asked to aid the accounting officers only in their action. And if I was right then, I would be clearly wrong now to give an opinion in a case which not only is not before the Secretary of the Treasury, but which evidently cannot reach him. My opinion would simply be advice to the Auditor and not to the Secretary, and this I have no power by law to give. I, therefore, respectfully decline to respond to the questions submitted by the Auditor, and herewith return the papers for his action. And I do this the more readily, as I recognize in his very clear and comprehensive presentment of the case, his entire ability to decide it rightly, without my aid.

I ought to say, in candor, that my present conclusion does not accord with my action in Porter's case, which was a claim before the Third Auditor under the act of March 3, 1849, referred to the Attorney General for his opinion. That case was left here by my predecessor, and was considered by me soon after I came into office, and when I was less familiar than now with the limits of my official powers and duties. Had I known then, as I have since learned, how often the Attorney General's office, which has no machinery to ascertain and test the accuracy or trustworthiness of alleged facts, is sought by doubtful

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Bristol's Case.

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claims as a refuge from the more thorough and searching investigations of the accounting officers and the Court of Claims, I should then have applied to that case the rule which I now apply to this one.

I am, sir, very respectfully,

Your obedient servant,

EDWARD BATES.

Hon. S. P. CHASE,

*Secretary of the Treasury.*

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## BRISTOL'S CASE.

1. A claimant of money payable from the Treasury has the right to choose his own agents and attorneys for collection, and to change them at pleasure.
2. In the absence of special contract, fees or compensation, payable by a claimant to his attorney, constitute a general charge against the client, but not a specific lien on the subject-matter of the suit.
3. The conflicting equities between a claimant and his attorneys should be left by the Executive Department to be settled before the courts.

ATTORNEY GENERAL'S OFFICE,

*December 21, 1863.*

SIR: The case stated in your letter of the 17th of December, is, substantially, this: Volney R. Bristol had a claim for money against the Republic of Costa Rica, which was submitted, for adjudication, to the joint Commission of the United States and Costa Rica. The claim was prosecuted before the board, to a final award in favor of the claimant, by M. Henry L. Rider, his attorney, who held sufficient power of attorney, authorizing him to prosecute the claim, "and to demand, recover, and receive" the money.

Afterwards, and after the final award, on the 14th of November, 1863, Bristol, the claimant, gave another power of attorney to Foster & Thompson "to collect the instalments as they should become due under the award," and they, Foster & Thompson, under the last power, now claim payment.

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Bristol's Case.

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The letter then proceeds to say: "Rider having obtained an equitable interest in the claim, *by prosecuting it up to the award*, the inquiry is respectfully addressed to you whether it is proper for this Department (which has received the amount of the award from Costa Rica, for the purpose of payment,) to pay it to Foster & Thompson, under the power of attorney given by Bristol to them?"

Upon the case stated, I have no doubt at all about the propriety of paying the money to Foster & Thompson. To refuse to do it would be to deny the right of Bristol to choose his own agents and attorneys, and to change them at his own pleasure.

"A power coupled with an interest" has been sometimes held by the courts not revocable at the pleasure of the grantor. But here there is no apparent interest in Rider. The claim was Bristol's, not Rider's; and there is no suggestion even that Rider had any *legal* interest in it. It is, indeed, suggested that Rider "obtained an *equitable* interest in the claim (not by virtue of any prior right in the subject matter, but) *by prosecuting it up to the award*." I confess my inability to see how any equitable claim upon the fund can accrue to him on that account. Nothing is said in the statement about fees or compensation; and if we must assume that fees were earned and due, still, in the absence of special contract, such fees do, undoubtedly, constitute a general charge against the client, and not a specific lien upon the subject-matter of the suit.

The right of Bristol to receive his money by the hands of his chosen attorneys, Foster & Thompson, seems to me a plain, legal right. And I think it would be prudent in the Department to follow the law, and leave the parties to settle their conflicting equities, if any they have, before the judicial tribunals.

I am, sir, very respectfully,

Your obedient servant,

EDWARD BATES.

Hon. WM. H. SEWARD,  
*Secretary of State.*

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Claim of Commodore Wilkes.

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## CLAIM OF COMMODORE WILKES.

1. The commander of a squadron is not entitled to share in prizes taken by a vessel of that squadron after he has transferred the command to his successor, although the captures were made in pursuance of instructions issued by such commander before the transfer of his command.
2. The flag-officer of a squadron is not entitled to the share of prize-money, accruing to the captain of his flag-ship, from captures made by that ship while her captain was detached on account of illness, and the flag-officer was *de facto* in command of her.

ATTORNEY GENERAL'S OFFICE,

March 4, 1864.

SIR: Before proceeding to consider the questions submitted to me by your letter of the 15th of November last, relative to the claim of Commodore, late Acting Rear Admiral, Charles Wilkes, to portions of certain prize moneys, I ought to explain that I have found it absolutely impossible to give them earlier attention, under the great pressure of labor and responsibility which the prolonged session of the Supreme Court and other duties, which could not be postponed, have imposed on me for some months past.

Your letter states that Commodore Wilkes presents two claims to prize money, on the validity of which you request my opinion, viz:

1. A claim to share, as commander of a squadron, in captures made after he had transferred the command of the squadron to his successor. On this claim you state that the captures in which he claims to share, were made subsequently to the transfer of his command. You do not give the dates of the transfer of command and of the captures, but Commodore Wilkes, in his communication to me of the 14th of November, 1863, states that the transfer of his command to Commodore Lardner, at headquarters, took place on the 20th of June, but that he remained within the limits of the station until the 2d of July. He also states that the captures in question were made by the "Santiago de Cuba" on the 21st and 22d of June. He



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Claim of Commodore Wilkes.

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alleges that sometime previous to the transfer of his command to Commodore Lardner, he had issued orders to Commander Wyman, of the "Santiago de Cuba," to cruise with special instructions for the purpose of making these captures.

The fifth clause of section third of the act for the better government of the Navy of the United States, approved July 17, 1862, (12 Stats., 600,) provides that "no commander of a fleet or squadron shall be entitled to receive any share of prizes taken by vessels not under his immediate command; nor of such prizes as may have been taken by ships or vessels intended to be placed under his command before they have acted under his immediate orders; nor shall a commander of a fleet or squadron leaving the station where he had the command, have any share in the prizes taken by ships left on such station after he has gone out of the limits of his said command, nor after he has transferred his command to a successor."

If, then, Commodore Wilkes transferred his command of the squadron, of which the "Santiago de Cuba" was a part, to Commodore Lardner on the 20th of June, and that vessel made the captures in question on the 21st and 22d of June, it is quite certain that on the two days last named, neither the "Santiago de Cuba," nor the squadron to which she belonged, was under the immediate command of Commodore Wilkes, and that the captures were made "after he had transferred his command to a successor." This is too clear for argument, and, upon the facts stated, I do not see how the claim of Commodore Wilkes can be sustained without a direct violation of the plain provisions of the law.

I have given to the argument of Commodore Wilkes attentive consideration, but I find nothing to disturb this conclusion. The question you have submitted is, not what proportion of the prize money is due to Commander Wyman, nor whether any of it is due to Commodore Lardner, and, therefore, I do not perceive the relevancy of the argument of Commodore Wilkes on those points. Nor is the

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Claim of Commodore Wilkes.

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question of his right to the prize money, resulting from these captures, affected by the fact stated by him that the captures were made under his special instructions issued to Commander Wyman for that purpose. Whatever might have been his direct agency in effecting the captures, any claim based thereon is sufficiently answered by the fact, that, under the statute, his right depends only on the question when the transfer of command was made, not on any equity arising out of his service prior to that transfer. As to the precedent cited by him in the case of Commodore Stockton, commanding the Pacific squadron in 1847, I will only add that whatever might have been its authority under the act of April 23, 1800, I do not think it of any force against the express words of the act of July 17, 1862, which are not found in the former act.

2. The second claim of Commodore Wilkes is for the share of prize money accruing to the commander of the ship which he occupied as his flag ship. You inform me that the captain of the flag ship having been detached in consequence of illness, Commodore Wilkes states that he "was actually the captain," and performed the duties, and he suggests that if he is precluded from being allowed the shares, both of the commander of the squadron and captain of the ship, he may be "allowed to choose to receive the share of the captain." You state that the Department is unable to inform me of any usage or precedent bearing on this claim. But you add that "the commander of a squadron has the command and may direct the movements and regulate the discipline of any vessel in his squadron, not more of the flag ship than of any other, though it is natural that he should exercise more supervision and command in the vessel where he is personally present; that, by naval usage, when the commanding officer of a vessel is removed from his command and no successor is appointed, the vessel still remaining in commission, the line officer next in rank succeeds to the command as a matter of course; that Commodore Wilkes was not required by any order, regulation, or usage, to act as the captain of his flag ship; that

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Claim of Commodore Wilkes.

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had the Department devolved this duty upon him without his consent, he might have sought relief from such an order on the ground that it not only derogated from his rank, but interfered with his more important duties and responsibilities." You also state that the Department would decline to avail itself of the voluntary assumption by Commodore Wilkes of the duties of a captain, as a precedent to require such duty hereafter of any flag officer, such precedent being an unsafe one.

It thus appears that, at the time the right to the prize money in question occurred, Commodore Wilkes was the flag officer of the squadron of which the capturing vessel was a part; that that vessel was, at the time, his flag ship, and its captain was "detached" by reason of illness; that Commodore Wilkes was not acting as captain of the vessel under any orders from the Department, but, on the contrary, that the Department declines to recognize him as such captain, or to admit that he possessed the right or was charged with the duty of assuming that position; and that by naval usage in such case, the line officer next in rank to the captain succeeds to the command. Under these circumstances, I do not see how the claim of Commodore Wilkes to the captain's share of prize money can be allowed. As commanding officer of the squadron, the statute sets apart to him a portion of the prize money. That portion he is entitled to receive, whether he acted as commander of the capturing ship or not. The question then is, not whether he shall receive the commander's share in lieu of it, but whether he shall receive the commander's share in addition to it. Certainly the statute did not intend that both shares should go to one person, for, all through, it treats them as going to different persons. But I must assume, on your statement, that Commodore Wilkes had no right to assume the relation of commander of the ship, and that, therefore, he was not in fact such commander. True, he might have chosen by virtue of his higher authority to do those things on board the ship, which the commander, if on board, should have done.

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Claim of Commodore Wilkes.

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But this did not make him the commander and give him the *status* which, by law and regulation, that officer has. Nothing less than the express or implied consent of the Department could give him that *status*, and even with that consent it would be a serious question, under the statute distributing prize money, whether, so long as he was commander of the squadron and as such entitled to his fixed share of prize money, he could also be captain of one of its ships and draw the captain's share also. But here the consent of the Department was not given, and the usage of the naval service gave the command of the ship to the officer next in rank to the detached commander. If then Commodore Wilkes chose to assume the duties of an office which neither law nor usage, nor the orders of the Navy Department, imposed on him, the performance of those duties confers no legal right to the advantages and emoluments which by law belong to that office, especially where those advantages and emoluments could only be allowed in derogation of the rights of others.

For if there was a commander of the capturing vessel in law or fact, within the terms of the statute of distribution, at the time the capture was made, he is entitled to the commander's share. If there was no such commander, then that share is part of the common fund, in which all concerned have a proportional right. In either event, to allow it to a higher officer, otherwise provided for in the distribution, would be to take that much from the party or parties entitled to it.

In my opinion, the claim of Commodore Wilkes to this share ought not to be allowed.

I am, sir, very respectfully,

Your obedient servant,

EDWARD BATES.

HON. GIDEON WELLES,  
*Secretary of the Navy.*

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Appeal of Illinois to the President.

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## APPEAL OF ILLINOIS TO THE PRESIDENT.

1. Under the act of March 3, 1857, requiring the Commissioner of the General Land Office to state an account between the United States and the State of Illinois, of the "two per cent. fund," the State has no legal right to take an appeal to the President, and require him to state such account, after the refusal of the Commissioner of the General Land Office and of the Secretary of the Interior to comply with the law.
2. The President is not an Auditor or Comptroller of Accounts, nor the Accountant General of the Nation; but he may require an accounting officer, and other subordinate Executive officers, to perform the duty imposed on them by statute.
3. The opinions of the Attorneys General, touching the relation of the President towards the administrative officers of the Departments and Bureaux, reviewed.

ATTORNEY GENERAL'S OFFICE,

*March 8, 1864.*

SIR: I beg to be excused for the long delay which has happened in answering upon the matter which you referred to me some time in January last, touching the claim of the State of Illinois against the United States, on account of the two per cent. fund, so called. I lost several weeks by sickness, and then business, both in the office and in the Supreme Court, which would not brook delay, compelled me to postpone the consideration of this matter until now.

The memorandum which you sent me does not, specifically, state the questions or points of law, upon which you require my opinion. But, judging from a careful examination of your memorandum, and some of the papers which accompanied it, I suppose the questions intended for my consideration may be fairly stated in the following form:

Under the acts of March 2, 1855, and March 3, 1857, "the State of Illinois has applied to have the Commissioner of the General Land Office state an account between the United States and said State, and to have allowed and paid over to said State such amount as shall thus be found due. The Secretary of the Interior, to whose Department the General Land Office and the Commissioner thereof

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Appeal of Illinois to the President.

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pertain, takes cognizance of the case, and disallows the claim of the State to have either payment or accounting. From this decision of the Secretary of the Interior, the State appeals to *you*, as President of the United States," and asks you to do, as President, what the statutes require to be done by the Commissioner of the General Land Office. And so, the question is,

Has the State of Illinois any legal right to take such appeal, and thereby impose upon the President the legal duty to do what the law plainly requires to be done by the Commissioner—*i. e.*, to *state the account, &c.*?

I am clearly of opinion that no such appeal lies. The President is not the accountant-general of the nation; is not an auditor or comptroller of accounts.

The act of March 3, 1857, section 2, (11 Stats., 200,) declares, "That the said Commissioner shall also state an account between the United States and each of the other States, upon the same principles, and shall allow and pay," &c. By the terms of this act, no powers are granted to, nor duties imposed upon, either the President or the Secretary of the Interior, but only to and upon the Commissioner of the General Land Office. And is it now to be denied that Congress has power to distribute the ministerial functions of Government among the functionaries of its own creation? The practice is coeval with the Government, and is in actual exercise every day. In fact, the contrary theory is simply impossible in practice; for neither the President, nor any Head of a Department, could, by any degree of laborious industry, revise and correct all the acts of his subordinates. And if he could, as the law now stands, it would be as illegal as unwise.

Although the President cannot be substituted for all his subordinates, and required to do all their work, in any contingency, yet doubtless, in one sense, he has a general oversight of all the officers of Government. For, by the Constitution, it is his duty to "take care that the laws be faithfully executed." And, in the discharge of that duty, he will, of course, act according to the subject-matter and

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the nature of each case before him. If the party who will not execute the law be a Judge, the President cannot perform his judicial duties. All he can do is to give the proper information to the House of Representatives, who may, if it think proper, apply the remedy of impeachment. But if the offender be a ministerial officer, civil or military, the remedy is in the President's own hand, and of easy application. He has nothing to do but turn him out, and fill his place with another man.

Under the act of 1857, it is the plain duty of the Commissioner of the General Land Office to state the account. I think he ought to be required to do it; for no one else (not the Secretary of the Interior nor the President) can do it for him. It is no objection to stating the account, that the Commissioner thinks there is no balance in favor of the claimant; for if that be so, the fact will appear, all the plainer, when the account is stated.

I forbear all further argument, and content myself with referring you to numerous opinions of my predecessors, (as collated below,) by which the doctrines I advance are fully settled *for this office*.

The question of the President's power to interfere with the action of the accounting officers in the settlement of accounts, repeatedly came before Attorney General Wirt, and he held that the duty imposed upon the President to take care that the laws be faithfully executed, placed the officers engaged in the execution of the laws under his general superintendence, and required him to see that they did their duty faithfully, and on their failure, to cause them to be displaced, prosecuted, or impeached, according to the nature of the case. But it did not mean that he should execute the laws in person—which would be absurd and impossible. That where the laws require a particular officer by name to perform a duty, not only must he perform it, but no other officer can lawfully do so, and were the President to perform it, so far from taking care that the laws were faithfully executed, he would be violating them himself, and he held that the President had no power

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to interfere with the accounting officers so long as they performed their duties faithfully. (1 Op. Atty. Genl., 624; *Ibid*, 636; *Ib.*, 678; *Ib.*, 706.)

Although Attorney General Taney, in Tharp's case, (2 Op., 463,) seemed to think that where a claim had been rejected by the accounting officers, and their decision confirmed by the Secretary of War, an appeal might lie to the President, it is clear that such was not his well-considered opinion. For in Grice's case, (2 Op., 481,) where the claim was rejected by the accounting officer, he declared that no appeal would lie from their decision to the President. And in General Taylor's case, (2 Op., 507,) where the President was asked to dismiss a suit on the ground that the accounting officers had not allowed certain credits, Attorney General Taney advised him that the law contemplated no appeal to the President, and that he did not possess the power to examine into the correctness of the accounts to repair errors that the accounting officers, appointed by law, might have committed. Again, in Hogan's case, where the President was asked to order the allowance of certain claims against the United States, which the accounting officer had rejected, Attorney General Taney advised him that such an appeal would not lie to him, and that he could not legally interfere. These three cases undoubtedly express the authoritative opinion of this distinguished officer on this question.

To the same effect is the opinion of Attorney General Crittenden in Pratt's case, (not printed,) and his elaborate opinion, (in 5 Op., 636,) wherein he reviews the precedents, and reaches the conclusion that the President has no authority to interfere in the settlement of accounts on appeal to him.

In this opinion Mr. Crittenden also maintains, with great ability and learning, the rightful authority of the Heads of Departments to interfere "*a priori* or *a posteriori*" in the settlement of accounts of their respective Departments; and this principle has been accepted by nearly all his successors, and may now be regarded as settled. It results,



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therefore, that a power of interference with the accounting officers exists in the Heads of Departments, which is not conceded to exist in the President. Although Attorney General Cushing calls this an "anomaly of relation," (6 Op., 343,) it is conceived that good reasons exist for the distinction.

The rule which has thus forbidden the President's interference in the settlement of accounts by the accounting officers has also been applied to other cases. Where an appeal was taken from the decision of the Secretary of War, approving the action of the Commissioner of Pensions in disallowing a claim for an increase of pensions, Attorney General Mason advised the President against entertaining the appeal, and, after citing the opinions of Messrs. Wirt and Taney, said "that the President could not adequately perform his high constitutional duties if he were to undertake to review the decisions of subordinates on the weight or effect of evidence, in cases appropriately belonging to them."

Where the State of Iowa claimed certain lands under a grant by Congress, and a question arose as to the extent of the grant, and the proper officers differed on that question, the President was asked to decide the question; but Attorney General Crittenden advised him that the act of Congress did not provide for, or appear to intend, any interposition by the President, and that his interference with the performance of the particular duties assigned by law to subordinate officers, either to correct errors or supply omissions, would, in the general, be exceedingly injudicious, if at all warrantable, and would moreover involve him in an endless and invidious task, occupying his whole attention and leaving no time for higher duties. He gave the same opinion where the President was invoked to interfere on behalf of certain parties for the decision and settlement of questions arising out of a contract and purchase of lands made by them from the Seneca Indians. (5 Op., 275.)

In conclusion, I adopt the language of the Supreme

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Court of the United States, (1 How., 297,) as an accurate and authoritative statement of the law on this subject. The President's duty in general requires his superintendence of the administration; yet this duty cannot require of him to become the administrative officer of every Department and Bureau, or to perform in person the numerous details incident to services which, nevertheless, he is, in a correct sense, by the Constitution and laws, required and expected to perform. This cannot be. Because, if it were practicable, it would be to absorb the duties and responsibilities of the various Departments of the Government in the personal action of the one chief executive officer. It cannot be, for the stronger reason, that it is impracticable—nay, impossible.

I am, sir, very respectfully,  
Your obedient servant,

EDWARD BATES.

The PRESIDENT.

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**PRESIDENT'S APPROVAL OF THE SENTENCE OF A COURT MARTIAL.**

1. After the trial and conviction of an officer of the Navy by a Court Martial having jurisdiction of the case, and the approval of the sentence, dismissing him from the service, by the President, and such sentence has been carried into execution; the President cannot reconsider his approval and revoke the sentence of the court.
2. But while the judgment entered by the President upon such a sentence is, after it has been executed, irrevocable, he may remove the guilt of the dismissed officer by pardon.
3. It is clear that Congress did not intend, by the provision in section eleven of the act of July 16, 1862, to forbid the re-appointment of an officer, dismissed by sentence of a Court Martial, to whom the President has extended pardon.

ATTORNEY GENERAL'S OFFICE,

March 12, 1864.

SIR: You have done me the honor to refer, for my opinion, a point presented to you by the Hon. Leonard Myers, of the House of Representatives, in his letter of

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the 14th of January last. I understand the question raised by Mr. Myers to be this:

Where a commissioned or warrant officer of the Navy has been regularly tried by a naval court martial, having lawful jurisdiction of the case, and has been sentenced to dismissal from the service, which sentence has been approved by the President of the United States, as required by the nineteenth article of the first section of the act of July 17, 1862, chap. 204, and has been carried into execution by the dismissal of such officer, can the President afterwards take off that approval and revoke the sentence of the court martial?

I would have preferred to consider this question with reference to the facts of the particular case in which it arises. But these facts are not before me, and I will content myself with responding to the question in the general form above stated.

The nineteenth article of the first section of the act of July 17, 1862, chap. 204, "for the better government of the Navy," (12 Stats., 600,) provides that "all sentences of courts martial," (naval,) "which shall extend to the loss of life, shall require the concurrence of two-thirds of the members present, and no such sentence shall be carried into execution until confirmed by the President of the United States. All other sentences may be determined by a majority of votes, and carried into execution on confirmation of the commander of the fleet or officer ordering the court, *except such as go to the dismissal of a commissioned or warrant officer, which are first to be approved by the President of the United States.*"

Article twentieth provides that "every officer who is by this act authorized to convene courts martial, shall have power, on revisal of its proceedings, to remit or mitigate, but not to commute, the sentence of any such court which by this act he is authorized to approve and confirm."

I have quoted article twentieth, because it shows that Congress intended that the officer who is authorized to approve and confirm the sentence of a court martial under

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this act, in revising its proceedings, should act *judicially*—that is, that he should exercise the discretion confided to him within the limits of law.

Undoubtedly the President, in passing upon the sentence of a court martial, and giving to it the approval without which it cannot be executed, acts judicially. The whole proceeding from its inception is judicial. The trial, finding, and sentence, are the solemn acts of a court organized and conducted under the authority and according to the prescribed forms of law. It sits to pass upon the most sacred questions of human rights that are ever placed on trial in a court of justice; rights which, in the very nature of things, can neither be exposed to danger nor entitled to protection from the uncontrolled will of any man, but which must be adjudged *according to law*. And the act of the officer who reviews the proceedings of the court, whether he be the commander of the fleet or the President, and without whose approval the sentence cannot be executed, is as much a part of this judgment, according to law, as is the trial or the sentence. When the President, then, performs this duty of approving the sentence of a court martial dismissing an officer, his act has all the solemnity and significance of the judgment of a court of law. As it has to be performed under the same sanctions, so it draws with it the same consequences. Now, one of these consequences is, that where a judgment has been regularly entered in a case properly within the judicial cognizance, from which no appeal has been provided or taken, and it has been followed by execution, it is final and conclusive upon the party against whom it is entered. And this effect attaches, in my opinion, to the action of the President in approving the sentence of a court martial dismissing an officer, after that approval has been consummated by actual dismissal. Undoubtedly if the sentence should be disapproved, and the action of the President result in establishing the innocence of the officer, all the legal consequences of such action in favor of the officer would follow. No man would assert the power of the President to reverse his

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judicial decision afterwards to the prejudice of the accused. But why should that judgment be any less permanent because it establishes his guilt? It must be accepted as final and conclusive in the one case as in the other, because it is the judgment which the law authorizes to settle the rights in controversy, from which no appeal has been given. And it may be added, that if it be open to subsequent consideration and reversal, the same principle would entitle a dissatisfied party to demand any number of reconsiderations and decisions, so that the subject would, practically, be open to endless controversy and litigation.

If this opinion as to the finality of the President's approval of the sentence of a court martial, followed by execution, needs the support of authority, it will be found in the cases cited by Attorney General Cushing in Devlin's case, (6 Op., 369,) and in Howe's case, (*Ibid*, 514.) It is true, that in most of these cases the question arose where the President was asked to reverse the action of a preceding President; but all the reasoning of Attorneys General Wirt, Legare, Nelson, Toucey, and Cushing, will be found directly in point in this case. For it is the judicial action of the President, not the uncontrolled will of the man, which is sought to be changed.

But whilst the judgment entered by the President in a case of this kind is, after it is executed, irrevocable, he may, in the exercise of another function, remove the guilt of the dismissed officer by a pardon. This act of clemency would purge the offence, but would not, of itself, restore him to his lost position. Generally, the power of the President to re-appoint the dismissed officer, after pardon, would be unquestioned. But the difficulty in cases of the class I have been considering, and to which Mr. Myers refers, is that the eleventh section of the act of July 16, 1862, (12 Stats., 583,) has this provision: "Nor shall any officer of the Navy, who has been dismissed by sentence of a court martial, or suffered to resign to escape one, ever again become an officer of the Navy."

Whether an officer dismissed by sentence of a court

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martial, who has been pardoned by the President, may again become an officer of the Navy, notwithstanding this provision, is a question not without difficulty. It is not the point specifically referred to in Mr. Myers's letter, and, therefore, I refrain from discussing it. But I do not hesitate to say, that I think it can be shown that Congress did not intend by this clause to preclude the President from re-appointing officers of the Navy dismissed by sentence of a court martial, to whom he has extended a pardon.

I am, sir, very respectfully,

Your obedient servant,

EDWARD BATES.

The PRESIDENT.

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NATIONAL BANKING ASSOCIATIONS.

1. Letters from officers of National Banking Associations, employed as depositaries of public moneys, on business arising from that employment, are not transmissible through the mail, free of postage, to the Treasury Department.
2. Such associations, employed under the fifty-fourth section of the National Currency Act of February 25, 1863, are "public depositaries," within the meaning of the act of March 3, 1857, chap. 114, and disbursing officers may avail themselves of such associations, except for the deposit of receipts for customs.

ATTORNEY GENERAL'S OFFICE,

*March 19, 1864.*

SIR: I have the honor to acknowledge the receipt of your letter of the 2d instant, in which you call my attention to the fifty-fourth section of the act to provide a national currency, &c., approved February 25, 1863, which authorizes the Secretary of the Treasury, whenever in his judgment the public interests will be promoted thereby, to employ any of such banking associations, doing business under that act, as depositaries of the public moneys, except receipts from customs. You state that a number of national banking associations have accordingly been designated as depositaries, on giving security, by pledge

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of United States bonds and certificates, and by personal bonds to the satisfaction of the Secretary of the Treasury—among which is the First National Bank of Newark. By the letter of the Treasurer of the United States to the Postmaster General, and the reply of the Acting Assistant Postmaster General to that letter, (copies of which you enclose to me,) I learn that the Postmaster General has decided that, although the First National Bank of Newark is a designated depository of public moneys, still, its officers are not officers of the Government within the meaning of the forty-second section of the postal law, and that, therefore, any communications they may have to make to the Treasury Departments, through the mails, must be prepaid, by postage stamps, at the mailing office.

You present for my opinion the following question :

1. Are letters from the proper officers of such banking associations, upon business arising from their employment as depositories, when certified by them to be on official business, transmissible through the mail, free of postage, to the Treasury Department ?

The forty-second section of the "act to amend the laws relating to the Post Office Department," approved March 3, 1863, (12 Stats., 701,) declares: "That authority to frank mail matter is conferred upon and limited to the following *persons*: First, The President of the United States, by himself or his private secretary. Second, The Vice President of the United States. Third, The chiefs of the several Executive departments. Fourth, Such principal officers, being heads of bureaus or chief clerks of each Executive Department, to be used only for official communications, as the Postmaster General shall by regulation prescribe. Fifth, Senators and Representatives in the Congress of the United States, including Delegates from Territories, the Secretary of the Senate and Clerk of the House of Representatives, to cover correspondence to and from them, and all printed matter issued by authority of Congress, and all speeches, proceedings, and debates in Congress, and all printed matter sent to them; their franking privilege to

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commence with the term for which they are elected, and to expire on the first Monday of December following such term of office. Sixth, All official communications addressed to either of the Executive Departments of the Government by an officer responsible to that Department: *Provided*, That in all such cases, the envelope shall be marked 'official,' with the signature of the writer thereto; and for any and every such endorsement of 'official' falsely made, the person making the same shall forfeit and pay three hundred dollars. Eighth, Petitions to either branch of Congress shall pass free in the mails. Ninth, All communications addressed to any of the franking officers above described, and not excepted in the foregoing clauses, must be prepaid by postage stamps," &c.

I have quoted all of this section which designates the persons to whom the authority to frank mail matter is given because, repealing, amending, and supplying former laws on the same subject, it presents a clear and complete view of the present extent of this authority. If letters from the proper officers of banking associations, designated as depositaries of public moneys, to the Treasury Department, on business arising from their employment as such depositaries, are entitled to pass through the mails free of postage, under the frank of those officers, it must be because the officers are embraced within one of the seven classes of persons first designated. If they are not included within those designated classes, then, of necessity, they belong to the ninth class, whose communications must be prepaid by postage stamps.

If these officers fall within any of these seven classes, it must be the sixth class, viz, officers who may address official communications to the Executive Department *to which they are responsible*, in any of which cases the envelope shall be marked official, with the signature thereto of the officer writing the communication. Are they within that class?

It is true that banking associations, employed as depositaries of public moneys, under the fifty-fourth section of the national currency act, will necessarily have occa-



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sion to correspond with the Treasury Department on official business; but so also will banking associations not employed as such depositories; for the act requires all associations issuing notes under its provisions to make quarterly reports to the Comptroller of the Currency, and the relation which the act establishes between them and the Treasury Department shows plainly enough that such correspondence will be very frequent. But whether the association be employed depositories or not, their officers, who correspond with the Treasury Department, are not officers "responsible to that Department," within the obvious meaning of the postal act. The official relation exists, not between the Department and the officers of the association, but between the Department and the association itself. These officers are responsible only to the association, and have no more connection with the Department than they have with other banks with which they conduct the correspondence and business of their employer. It is not necessary to consider here whether the associations are themselves "responsible" to the Department, within the meaning of the postal act, for they are corporations and not persons, and the franking privilege is conferred on and limited to persons only. Whatever may be the extent and character of their responsibility, they are certainly not responsible as officers. These communications, then, are not within the sixth class, because the officers who write them, though "persons," are not "responsible to the Department," but to the associations, and the associations, even if responsible to the Department, are neither "persons" nor "officers."

It may be said the communications are "official," and therefore within the spirit, if not within the letter of the act. Waiving the response that it is enough, that the clear letter of the law excludes them, I answer, that even if we could ascertain with precision what communications are "official" and what are not, still many that are clearly "official" are not within the sixth or any other privileged class. The communications from the Governors of States

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to the War Department are not entitled to pass free of postage, and yet they may be clearly official. So may be the letters of a contractor to the Department to which he has given bonds; but he must prepay the postage on them. Even the correspondence of United States judges with this office, though it may be strictly official, must be prepaid, for they are not responsible to the Attorney General. These may be, probably are, defects in the postal law, but they illustrate clearly enough that correspondence with a Department may be official, and yet be not provided for in the sixth class.

It follows, then, in my opinion, that letters from proper officers of banking associations, employed as depositaries of public moneys, on business arising from that employment, when certified by them to be on official business, are not transmissible through the mail, free of postage, to the Treasury Department. I think they fall within the ninth class enumerated in the forty-second section of the postal act, as communications addressed to franking officers, not excepted in the preceding classes, which must be prepaid by postage stamps.

2. You also submit for my opinion this question :

Does the term "public moneys" (in the fifty-fourth section of the national currency act of February 25, 1863,) include moneys placed to the credit of disbursing officers on the books of the assistant treasurers, or held by them for disbursement, so that such officers can avail themselves of these associations as they may avail themselves of other designated depositaries?

The fifty-fourth section of the act of February 25, 1863, (12 Stats., 680,) authorizes the Secretary of the Treasury, whenever in his judgment the public interest will be promoted thereby, to employ any of the banking associations doing business under that act as depositaries of the public moneys, except receipts for customs.

What is to be understood by the phrase "depositaries of the public moneys?" I understand it to mean, places where the moneys of the United States may be lawfully

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deposited for safe keeping, just as, under the act of August 6, 1846, the Mint of the United States, in the city of Philadelphia, and the Branch Mint, in the city of New Orleans, and the rooms and offices of the assistant treasurers in New York and Boston, are such places. For this purpose, then, the Secretary of the Treasury is authorized by the fifty-fourth section of the act of 1863, to employ banking associations doing business under that act, with the limitation that he cannot so employ them as depositaries of any public moneys that are receipts from customs. Where public moneys are thus deposited in the employed associations, according to law, in my opinion, disbursing officers of the Government can avail themselves of such associations in the same manner as by law they may avail themselves of the designated public depositaries.

The act of August 6, 1846, (9 Stats., 59,) having established and designated certain places for the deposit and safe keeping of the public moneys, and authorized the appointment of certain officers, in addition to the Treasurer of the United States, to have the custody and care of the public moneys at those places, provided that the Treasurer of the United States, the treasurer of the Mint of the United States, the treasurers and those acting as such of the various branch mints, all collectors of the customs, all surveyors of the customs acting also as collectors, all assistant treasurers, all receivers of public moneys at the several land offices, all postmasters, and all public officers, of whatsoever character, should be required to keep safely, without loaning, using, depositing in banks, or exchanging for other funds than as allowed by that act, all the public money collected by them, or otherwise at any time placed in their possession and custody, till the same was ordered, by the proper Department or officer of the Government, to be transferred or paid out; and when such orders for transfer or payment were received, faithfully and promptly to make the same as directed, and to do and perform all other duties, as fiscal agents of the Government, which might be imposed by that or any other acts of Congress,

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National Banking Associations.

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or by any regulation of the Treasury Department made in conformity to law, &c.

The act of March 3, 1857, chap. 114, (11 Stats., 249,) enacts (section first) that the act of August 6, 1846, (just cited,) shall be so amended that each and every disbursing officer or agent of the United States, having any money of the United States intrusted to him for disbursement, shall be required to deposit the same with the Treasurer of the United States, or with some one of the assistant treasurers or public depositaries, and draw for the same only in favor of the persons to whom payment is to be made in pursuance of law and instructions, except when payments are to be made in sums under twenty dollars, in which cases such disbursing agent may check in his own name, stating that it is to pay small claims.

Section second provides that the Treasurer of the United States, assistant treasurers, and public depositaries, shall safely keep all moneys deposited by any disbursing officer or disbursing agent of the United States, as well as any moneys deposited by any receiver, collector, or other person, which shall be the moneys of, or due or owing to, the United States.

And section third requires every person who shall have moneys of the United States in his hands or possession, to pay the same to the treasurer, assistant treasurer, or public depositary of the United States, and take his receipt for the same, in duplicate, and forward one of them forthwith to the Secretary of the Treasury.

These provisions comprehensively declare the duties of the various public depositaries as to receiving, keeping safely, and paying out the moneys of the United States, and also the methods in which disbursing officers and agents are to avail themselves of those public depositaries. In my opinion, the provisions of the above quoted act of March 3, 1857, embrace such banking associations as shall be employed by the Secretary of the Treasury under the fifty-fourth section of the act of February 25, 1863, as depositaries of public moneys. To the extent to which they

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Case of Delano and Russell.

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may be employed, viz, as depositaries of all public moneys except receipts from customs, they are "public depositaries" within the meaning of that act; and as such public depositaries, the disbursing officers of the Government may avail themselves of the employed banking associations, as they may avail themselves of other designated depositaries, with the exception stated of public moneys that are receipts from customs.

I am, sir, very respectfully,

Your obedient servant,

EDWARD BATES.

Hon. S. P. CHASE,

*Secretary of the Treasury.*

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## CASE OF DELANO AND RUSSELL.

The President has no duty to perform in respect to an application by the sureties in a bond given to the United States under the Guano-Island Act of August 18, 1856, to be released from their obligation in consequence of a breach of the bond by their principal.

ATTORNEY GENERAL'S OFFICE,

March 23, 1863.

SIR: As soon as my other pressing duties would permit, I have considered the documents which you sent me on the 19th instant, and in regard to which you required my opinion, "whether, by the Constitution or law, the President has any duty to perform in the case; and, if any, what it is?"

Although the papers, as a whole, form a considerable volume, yet the case, as presented by those who ask your interposition, lies in a very narrow compass.

It seems that J. W. Delano and Wm. W. Russell (as they allege) became securities "on the bonds of the *American Guano Company* for Jarvis and Baker's Islands, executed in 1856, to the United States of America, as required by the act of Congress entitled 'An act to authorize protection to be given to citizens of the United States who

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The Franking Privilege.

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discover deposits of guano,' approved August 18, 1856. They allege, also, that the condition of the bond has been broken by their principal, the guano company; and that they had no power to restrain said company from committing said breach of said act and bonds, and *therefore* respectfully request that they may be released from such obligations as may attach to them as sureties upon said bonds."

That is the whole case, as stated by the parties themselves. And, as I cannot conceive of a man of business who can believe that the mere breach of his bond is a sufficient reason for releasing its obligations, I must suppose that this application to you was aimed at some hidden object not revealed in the petition. Perhaps the hope was entertained that you might be entrapped into the expression of opinions or purposes bearing upon ulterior measures to be taken concerning those guano islands.

It is my opinion that, by the Constitution and law, the President has not any duty to perform in this case.

I am, sir, very respectfully,

Your obedient servant,

EDWARD BATES.

The PRESIDENT.



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EXERCISE OF THE FRANKING PRIVILEGE.

Under the Postal Act of March 3, 1863, Sec. 42, the head of a bureau in one of the Executive Departments can exercise the authority to send mail matter free of postage, by impressing his name on the outside of the package to be mailed, with an engraved stamp, as well as by writing his signature thereon.

ATTORNEY GENERAL'S OFFICE,

*March, 26, 1854.*

SIR: I have the honor to acknowledge the receipt of your letter of the 21st instant, in which you state that, without your knowledge or authority, it has been the practice of certain heads of bureaus in the Treasury Depart-

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The Franking Privilege.

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ment to frank official papers by the impression of a stamp, or by the use of an engraved signature, instead of by writing the name; the practice, it is said, having been recognized and sanctioned by the Postmaster General. You request my opinion as to the legality of any other than an autographic frank.

The question, of course, refers to the authority to frank official papers for transportation in the mails free of postage. The 42d section of the Postal Act of March 3, 1863, (12 Stats., 708,) declares "that the authority to frank mail matter is conferred upon and limited to certain persons," among whom are "Fourth, such principal officers, being heads of bureaus or chief clerks of each Executive Department, to be used only for official communications, as the Postmaster General shall by regulation prescribe." The authority, then, is to "frank" mail matter. Used in this relation, the word "frank" means the privilege of sending mail matter through the mails free of postage. The persons entitled to and exercising this privilege must, by some mark on the outside of the package to be mailed, indicate that it is mailed by him. Of course, to effect this object, the outside mark must include his name. Is it, then, necessary that his name should be written there by his own hand—that it should be his own autographic signature? I think not. Undoubtedly, the best way to give the information that the document is mailed by him is to write his name on the outside of it; but the best way is not necessarily the only way, and the act which confers the authority does not, except as to the sixth and seventh classes it enumerates, attempt to designate the method in which it shall be exercised. Any method adopted and used by the person on whom the authority is conferred, by which he impresses on the document the information needed, and signifies his intention to avail himself of his authority, will be sufficient. If that method be by impressing his name on the document by an engraved stamp, that act, expressing his intention to exercise the conferred authority, will carry with it all the sanctions, and will be

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The Franking Privilege.

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subject to all the responsibilities which the law attaches to it, just as if he had written his name with his hand.

Many legal analogies support this view of the subject. Although in modern times a man usually gives his assent to a document which is to bind him by subscribing his signature to it, still, even yet when most men in civilized countries can write their names, it is, in many cases, not necessary, for he may bind himself by making his *mark*, as by making the sign of the cross in a space between his name as written by another, which custom among illiterate persons has descended from the Saxons. The execution of a deed by seal was, at the common law, effected by an impression upon wax or wafer, or some other tenacious and impressible substance, and the use of rings and signets for that purpose, by way of signature and authority, is corroborated by the usages and records of all antiquity, sacred and profane. Even under the rigid requirement of the English statute of frauds, "that some note or memorandum in writing, signed by the party to be charged," must be made, Lord Eldon held that a bill of parcels, in which the vendor's name was *printed*, delivered to the vendee at the time of an order given for the future delivery of goods, was a sufficient memorandum of the contract. (2 Bos. & Pul., 238.)

The essential thing is that the act in question must be the expression of the will of the person authorized to act in a form plainly intelligible. The act in one form may be capable of easier proof than in another; but in either form it is legal and valid, if it be such intelligible expression of his will. If, therefore, the head of a bureau authorized to frank mail matter does so by impressing on it his name with a stamp, it is, in my opinion, as legal and valid an exercise of his authority as if he writes his name thereon.

I am, sir, very respectfully,

Your obedient servant,

EDWARD BATES.

Hon. S. P. CHASE,

*Secretary of the Treasury.*



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Warden of the Jail of the District of Columbia.

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## WARDEN OF THE JAIL OF THE DISTRICT OF COLUMBIA.

The Act of February 29, 1864, authorizing the appointment of a Warden of the Jail in the District of Columbia, deprives the Marshal of the District of Columbia of the power of executing sentence of death upon any person imprisoned in the jail of that District under such sentence.

## ATTORNEY GENERAL'S OFFICE.

March 28, 1864.

SIR: I have had the honor to receive your note of this day, endorsed upon a printed copy of "a bill to authorize the appointment of a warden of the jail in the District of Columbia."

You require my opinion "whether this law relieves the marshal of the District from the duty of executing the death-sentence upon persons under that sentence in the District jail?" That bill having become a law, as your note implies, I think it clear, beyond a doubt, that the marshal no longer has any duty or lawful power to execute any sentence of death upon any man imprisoned in the jail of the District of Columbia under sentence of death.

The 2d section of the act is explicit, and is in these words: "That the said warden shall have the exclusive supervision and control of the jails in said District, and be accountable for the safe-keeping of all the prisoners legally committed thereto; and shall have *all the power* and discharge *all the duties* heretofore legally exercised and discharged over said jails *and the prisoners* therein, by the marshal of the said District."

This plainly transfers all the powers and duties of the marshal in that behalf to the warden of the jail.

I am, sir, very respectfully,

Your obedient servant,

EDWARD BATES.

The PRESIDENT.

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Franking Privilege—Caldwell's Case.

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## EXERCISE OF THE FRANKING PRIVILEGE

The Head of a Bureau, entitled to frank mail matter, cannot delegate to another person the power to frank such matter by using his stamp.

ATTORNEY GENERAL'S OFFICE,

*March 30, 1864.*

SIR: Your letter of yesterday requests my opinion whether the mechanical use of a stamp or engraved signature of the name of the head of a bureau, in franking packages for transmission by mail, can, for the purpose of facilitating the prompt transaction of the public business, be properly delegated by the head of the bureau to another person, who, under his direction, shall stamp the documents in question with his engraved frank, or whether the stamping must be done with his own hand.

In my opinion the stamping must be done by the hand of the head of the bureau to whom the authority is given by the postal act.

I am, sir, very respectfully,

Your obedient servant,

EDWARD BATES.

Hon. S. P. CHASE,

*Secretary of the Treasury.*

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CALDWELL'S CASE.

Where a fine was imposed on a person by judicial sentence, on conviction for crime against the United States, but the sentence was not enforced during the lifetime of the party, the President has power to remit the fine after his death.

ATTORNEY GENERAL'S OFFICE,

*April 15, 1864.*

SIR: I learn by the memorial of the Hon. E. Dumont and others, Representatives in Congress from the State of Indiana, to you, (which you have referred to me,) that a man named John Caldwell was convicted, in the United States District Court for the District of Indiana, of aiding

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Caldwell's Case.

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to rescue a deserter, and was sentenced by that court to pay a fine of \$500; that since the sentence, and without having paid the fine, he has died, leaving a wife and young children with no means of support except a small piece of land worth little more than the amount of the fine. Under these circumstances you request my opinion whether the President has legal power to remit the fine.

Of course there would be no question of your power to do so were Caldwell yet living. Does his death take away your power to remit the fine which if now enforced will operate as a punishment, not of the guilty person, but of his innocent family? I think not. No just object of punishment can now be effected by enforcing the fine. And if the President could relieve him, living, from the penalty of guilt, surely the same power must be operative to protect his family from that penalty, after his death, in a case where it ~~was~~ not enforced in his lifetime. It might be doubtful on technical principles whether the President could grant a deed of pardon to a man after his death, since, as Chief Justice Marshall says, in *United States vs. Wilson*, (7 Pet., 161,) "a pardon is a deed, to the validity of which delivery is essential, and delivery is not complete without acceptance," and, of course, there can be no delivery to and acceptance by a dead man.

But a distinction exists between the act of pardon by which a man is relieved of corporal punishment for guilt and the act for remission of a fine which operates on his estate only. The technical reason which *may* (I do not say *will*) prevent a pardon from operating in favor of a dead man, does not apply to the remission of a fine, for that may be accepted by the heirs to the estate whose interests are affected by it. The distinction between pardon of corporal punishment and remission of a pecuniary fine is recognized by the act of February 20, 1863, chap. 46, which gives the President full discretionary power to remit the one without disturbing the other.

In my opinion you have the power to remit the fine imposed on the late John Caldwell, notwithstanding his

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Case of Rev. Samuel Harrison.

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death, by an instrument reciting the circumstances of the case.

I am, sir, very respectfully,

Your obedient servant,

EDWARD BATES.

The PRESIDENT.

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CASE OF REV. SAMUEL HARRISON.

1. A person of African descent elected and commissioned by the Governor of Massachusetts as Chaplain of the 54th Regiment of Massachusetts volunteers, and duly mustered and accepted into the service of the United States, is entitled to the full pay provided by law for the chaplain of a volunteer regiment.
2. No provision of law, constitutional or statutory, ever prohibited the acceptance of "persons of African descent" into the military service of the United States as private soldiers, or as commissioned officers, if otherwise qualified to be officers.
3. The statutes prescribing the qualifications of chaplains in the army do not preclude the appointment of a Christian minister to the office of chaplain because he may be a person of African descent.
4. The *proviso* to the 15th section of the Act of July 17, 1862, chap. 201, was not intended to fix the compensation of all "persons of African descent," in the military service of the United States, but only of those who might be employed for the humbler kinds of service mentioned in the act.

ATTORNEY GENERAL'S OFFICE,

*April 23, 1864.*

SIR: You have done me the honor to refer to me a communication to yourself from his Excellency John A. Andrew, Governor of Massachusetts, with accompanying papers, relative to the claim of Rev. Samuel Harrison for pay as chaplain of the 54th regiment of Massachusetts volunteers.

It appears by Governor Andrew's letter and the other papers that Mr. Harrison, who is a colored man, was duly elected, and on the 8th day of September, 1863, commissioned by Governor Andrew as chaplain of the 54th regiment of Massachusetts volunteers in the service of the United States; that on the 12th of November, 1863, he

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Case of Rev. Samuel Harrison.

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was mustered and accepted into the service of the United States, at Morris Island, South Carolina, by the proper mustering officer, and actually performed the duties of chaplain of that regiment, then and since serving in South Carolina. On demanding his pay as chaplain, on the 4th of February, 1864, he was met by the following refusal in writing, signed by the paymaster at Hilton Head :

“ Samuel Harrison, chaplain of the 54th regiment Massachusetts volunteers, (colored troops,) asks pay at the usual rate, \$100 per month and two rations, which, he being of African descent, I decline paying under the act of Congress passed July 17, 1862, employing persons of African descent in the military service of the United States. The chaplain declines to receive anything less.”

You have requested my opinion whether the paymaster should have paid as demanded ; and, if he should, whether it is your duty to order him to do so.

The 54th regiment of Massachusetts volunteers was organized in the same manner as were other regiments of State volunteers, under the following order of the War Department, dated January 26, 1863, viz :

“ *Ordered*, That Governor Andrew, of Massachusetts, is authorized, until further orders, to raise such number of volunteer companies of artillery for duty in the forts of Massachusetts and elsewhere, and such corps of infantry for the volunteer military service as he may find convenient, such volunteers to be enlisted for three years or until sooner discharged, and may include persons of African descent, organized into separate corps. He will make the usual needful requisitions on the appropriate staff bureaus and officers for the proper transportation, organization, supplies, subsistence, arms, and equipments of such volunteers.

“(Signed)

EDWIN M. STANTON,  
*Secretary of War.*”

I do not know that any rule of law, constitutional or statutory, ever prohibited the acceptance, organization, and

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Case of Rev. Samuel Harrison.

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muster of "persons of African descent," into the military service of the United States, as enlisted men or volunteers. But whatever doubt might have existed on the subject had been fully resolved before this order was issued by the 11th section of the act of July 17, 1862, chap. 195, which authorized the President to employ as many persons of African descent as he might deem necessary and proper for the suppression of the rebellion; and for that purpose, to organize and use them in such manner as he might judge best for the public welfare; and the 12th section of the act of same date, chap. 201, which authorized the President to receive into the service of the United States, for the purpose of constructing entrenchments, or performing camp service, or any other labor, or any military or naval service for which they might be found competent, persons of African descent, such persons to be enrolled and organized under such regulations, not inconsistent with the Constitution and laws, as the President might prescribe.

The 54th Massachusetts regiment was, therefore, organized and mustered into the service of the United States under clear authority of law.

But the 15th section of the act of 17th July, 1862, chap. 201, after directing that all persons who have been or shall be enrolled in the service of the United States under that act, shall receive the pay and rations then allowed by law to soldiers, according to their respective grades, contains this *proviso*: "That persons of African descent, who under this law shall be employed, shall receive ten dollars per month and one ration, three dollars of which monthly pay may be in clothing."

Whether persons of African descent, "enrolled in the service of the United States" as private soldiers, are included within the words, "persons of African descent who under this law shall be employed," thereby limiting their pay as soldiers to ten dollars a month, is not the question you have submitted to me. For Mr. Harrison was not a private soldier, but an officer, serving under the commia-

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Case of Rev. Samuel Harrison.

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sion of the Governor of Massachusetts, the authenticity and validity of which were recognized and admitted by the United States when he was mustered into its service. But the question is, can a person of African descent lawfully hold the office and receive the pay of chaplain of a volunteer regiment in the service of the United States?

I have already said that I know of no provision of law, constitutional or statutory, which prohibited the acceptance of persons of African descent into the military service of the United States; and, if they could be lawfully accepted as private soldiers, so also might they be lawfully accepted as commissioned officers, if otherwise qualified therefor. But the express power conferred on the President by the 11th section of the act of July 17, 1862, chap. 195, before cited, to employ this class of persons for the suppression of the rebellion as he may judge best for the public welfare, furnishes all needed sanction of law to the employment of a colored chaplain for a volunteer regiment of his own race.

Nor is any prohibition of the employment of such persons found in the statutes which declare the qualifications of chaplains. The 9th section of the act to authorize the employment of volunteers, &c., of July 22, 1861, chap. 9, provides that there shall be allowed to each regiment one chaplain, who shall be appointed by the regimental commander on the vote of the field officers and company commanders on duty with the regiment at the time the appointment shall be made. The chaplain so appointed must be a regular ordained minister of a Christian denomination. The 7th section of the act of August 3, 1861, chap. 42, for the better organization of the military establishment, declares that one chaplain shall be allowed to each regiment of the army, to be selected and appointed as the President may direct. Provided that none but regularly ordained ministers of some Christian denomination shall be eligible to selection or appointment. The 8th section of the act of July 17, 1862, chap. 200, declares that the two sections last cited shall be construed to read,

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Case of Rev. Samuel Harrison.

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as follows: "That no person shall be appointed a chaplain in the United States army who is not a regularly ordained minister of some religious denomination, and who does not present testimonials of his present good standing as such minister, with a recommendation for his appointment as an army chaplain from some authorized ecclesiastical body, or not less than five accredited ministers belonging to said religious denomination."

The closest inspection of these provisions will discover nothing that precludes the appointment of a Christian minister to the office of chaplain because he is a person of African descent. I, therefore, conclude that Mr. Harrison was the lawfully appointed and qualified chaplain of the 54th Massachusetts regiment.

The 9th section of the act of July 17, 1862, chap. 200, provides that thereafter the compensation of all chaplains in the regular or volunteer service, or army hospitals, shall be one hundred dollars per month, and two rations a day when on duty. Was Mr. Harrison entitled to this rate of compensation, or was he limited to the pay of ten dollars a month and one ration, fixed by the *proviso* to the 15th section of the act of July 17, 1862, chap. 201?

It will be observed that this *proviso* declares that ten dollars a month and one ration shall be received by persons of African descent employed under the law of which it is a part, viz, the act of July 17, 1862, chap. 201. Now we have seen that it is not necessary to resort to that law to find authority for the appointment of Mr. Harrison as chaplain; for, apart from the authority which might be presumed to exist prior to the enactment of any of these statutes, the 11th section of the act of July 17, 1862, chap. 195, sufficiently warranted it. To bring him, then, within the sweep of this *proviso*, and thus withdraw him from the reach of the act which specifically fixes the pay of this class of officers, to which by clear law he belongs, would violate the plainest principles of construction. The act of which the *proviso* is a part was not intended, in my opinion, either to authorize the employment or fix the pay of



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any persons of African descent except those who might be needed to perform the humble offices of labor and service for which they might be found competent. The 12th section authorizes them to be received into service for the purpose of constructing intrenchments or performing camp service, or any other labor, or any military or naval service for which they might be found competent. The 18th section declares that when any man or boy of African descent, who by the laws of any State shall owe service or labor to any person aiding the rebellion, shall render such service as this act provides for, he, his mother, wife, and children, shall be free thereafter, with certain exceptions. And the 18th section fixes their pay, as before stated. Whilst it is true that the words of the 12th section are broad enough to embrace all persons of African descent who may be received into the military or naval service of the United States, it is yet quite evident from the terms of the whole section, as well as from the promise of freedom held out to such persons who were slaves, in the 18th section, that in limiting their pay to ten dollars a month and one ration, Congress had in view the class who were fitted only for the humbler kinds of service referred to, and not persons who, under the authority of other laws, might be appointed to positions requiring higher qualifications and entitled to a higher rate of pay. To assume that because Mr. Harrison is a person of African descent he shall draw only the pay which this law establishes for the class it obviously refers to, and be deprived of the pay which another law specifically affixes to the office he lawfully held, would be, in my opinion, a distortion of both laws, not only unjust to him, but in plain violation of the purpose of Congress. I, therefore, think that the paymaster should have paid Mr. Harrison his full pay as chaplain of a volunteer regiment.

Your attention having been specially called to the wrong done in this case, I am also of opinion that your constitutional obligation, to take care that the laws be faithfully executed, makes it your duty to direct the Secretary of

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Fort Pillow Massacre.

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War to inform the officers of the pay department of the army that such is your view of the law, and I do not doubt that it will be accepted by them as furnishing the correct rule for their action.

I am, sir, very respectfully,  
Your obedient servant,  
**EDWARD BATES.**

The PRESIDENT.

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FORT PILLOW MASSACRE

Advice given to the President as to the course the Government should take with reference to the massacre by the Rebels of colored Union soldiers at the capture of Fort Pillow.

ATTORNEY GENERAL'S OFFICE,  
*May 4, 1864.*

SIR: I insert your brief note of the 3d instant entire, in order that my remarks, by way of opinion, may appear to be pertinent and conformable:

"EXECUTIVE MANSION,  
*Washington, May 3, 1864.*

"SIR: It is now quite certain that a large number of our colored soldiers, with their white officers, were by the rebel forces massacred, after they had surrendered, at the recent capture of Fort Pillow. So much is known, though the evidence is not yet quite ready to be laid before me. Meanwhile, I will thank you to prepare, and give me in writing, your opinion as to what course the Government should take in the case.

"Yours truly,  
"A. LINCOLN.

"Hon. ATTORNEY GENERAL."

I foresaw the great probability of such horrid results as those exhibited in the massacre of Fort Pillow, (and, as reported, at other places,) and that was one of the reasons why, from the beginning, I was unwilling to employ negro

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Fort Pillow Massacre.

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troops in the war. Not because, in my judgment, there is anything in the mere fact of the employment of such troops legally or morally wrong, but upon grounds of policy which seemed to me prudent and wise. *All* history teaches us that men (especially in the excitements of open rebellion and revolutionary violence, when all legal barriers are broken down, and all moral restraints removed,) are always more swayed by their passions and prejudices than by reason and judgment; more prone to indulge the fierce passion of revenge than to practice the mild virtues of prudence, moderation, and justice, the end of which is commonly wisdom and peace.

I knew something of the cherished passions and the educated prejudices of the southern people, and I could not but fear that our employment of negro troops would add fuel to a flame already fiercely burning, and thus excite their evil passions to deeds of horror, shocking to humanity and to Christian civilization. If they alone were doomed to bear the shame and curse of such barbarity, I might have viewed the subject with less of alarm, content to see them sink under a load of moral infamy, superadded to their political crimes. But I feared that it could not be so. I feared that the crime, once begun, we might be drawn into the vortex, and made, however unwillingly, sharers in their guilt and punishment; that we might feel ourselves, in a measure, constrained to practice the like cruel severities, in just retaliation for the past and in prudent prevention for the future. What I then foresaw only in apprehension is now realized in fact; and we are forced to choose between evils, and in the midst of opposite difficulties, what measures are wisest and best (in view of all the circumstances) to punish past atrocities, and prevent their repetition.

Wiser men than I determined the good policy of employing black soldiers, and I (freely acquiescing in their wisdom and authority) accept the new condition, with all its consequences. Surely it is not for the enemy to dictate to us what kind of troops we shall employ against them.

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Fort Pillow Massacre.

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They did not ask our consent to their employment of Indian savages in the war West, and yet, as I am credibly informed, some of our wounded Missouri soldiers were *tomahawked and scalped* by their red troops on the bloody field of Pea Ridge.

Every belligerent must and will choose for himself what soldiers he will employ, and, having chosen, it is not a debatable question whether he shall protect, and, if need be, avenge them. It is a simple duty, the failure to perform which would be a crime and a national dishonor.

Having said this much in explanation of my position and relations with the subject, I proceed to the precise point suggested by your Excellency, which is, *what course should be taken by the Government* in relation to the case?

This, it seems to me, presents, not a question of law, but questions of prudence and policy only; for, as far as I can judge, the law is clearly with you to inflict such punishment or exact such retribution for the outrage as may be at once within your power, and sanctioned by your wise discretion. The case, however, is so complicated in its relations, and the consequences of your resolution so important and diversified in themselves, and, possibly, so terrible in their results, that the utmost care and deliberation are, it seems to me, necessary to a successful and honorable result.

With these views, I give my opinion and advice as follows:

1. Adopt no plan of action, and, especially, make no threat of vengeance or retaliation, without resolving at the same time to act it out to the letter, meeting all its consequences, direct and contingent.
2. Demand of the enemy, through your proper military officer, to know whether he avows the massacre at Fort Pillow as a governmental act, or disavows it as a personal crime.
3. If he disavow the act, then demand that he surrender to you the two generals, Forest and Chalmers, who commanded the army which took Fort Pillow and perpetrated

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**Fort Pillow Massacre.**

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the atrocities complained of, to be dealt with at your discretion.

4. If he avow and justify the act, then issue an order, directed to all your commanders of armies, and all commanders of separate or detached posts and forts, and to all naval commanders, to the effect that whenever one or more of the army of the enemy which captured Fort Pillow and committed the massacre there shall come within the power of such commander, he, the commander, shall cause instant execution to be done upon all such, whether officers or privates.

5. I would have no compact with the enemy for mutual slaughter; no cartel of blood and murder; no stipulation to the effect that "*if you murder one of my men, I will murder one of yours.*"

Retaliation is not mere justice. It is avowedly revenge, and is wholly unjustifiable in law and conscience unless adopted for the sole purposes of punishing past crime and of giving a salutary and blood-saving warning against its repetition. In its very nature it must be discretionary.

I will not say that there is no danger that a desperate enemy, in pretended answer to such a course, may make the closing scenes of this war, already replete with horrors, one disgusting spectacle of blood and fire. If that be the demoniac spirit of our enemies, which God in his mercy forbid! still, be it so; we of necessity must accept the consequences. But upon their souls be the guilt, and upon them be the punishment, both here and hereafter.

The subject is full of difficulties, and we have at best only a choice of evils. And I pray God that your mind may be so enlightened as to enable you to choose a course of measures most for the good of our country, and least productive of evil consequences.

All of which is respectfully submitted.

I am, sir, very respectfully,

Your obedient servant,

EDWARD BATES.

The PRESIDENT.

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Land Claim of the Missionary Society.

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**LAND CLAIM OF THE MISSIONARY SOCIETY OF THE  
METHODIST EPISCOPAL CHURCH.**

1. A grant of public land by statute is the highest and strongest form of title known to our law. It is stronger than a patent, which may be annulled by the judiciary upon a proper case shown; whereas, even Congress cannot repeal a statutory grant.
2. The act of August 14, 1848, "to establish the Territorial Government of Oregon," vests in each religious society a perfect title to the land, (not exceeding six hundred and forty acres,) occupied by it in the Territory of Oregon on the day of the date of the act, as a missionary station among the Indians; and all that a claimant of land under that act is required to prove to establish a perfect title is, that upon the 14th of August, 1848, it did occupy the land as a missionary station among the Indian tribes in said Territory.
3. The question of fact upon which the title of claimants, under the act, depends should be left by the Land Office to the decision of the courts.
4. No executive officer has power to determine that question definitively. The claimants may recover the land in the courts even after a decision against them by the Land Office.
5. The Land Office should refuse to issue a patent to claimants of land under the act of August 14, 1848, and thus decline jurisdiction of the questions of fact on which their title depends.

ATTORNEY GENERAL'S OFFICE,

May 27, 1864.

SIR: In the first place, I must beg your pardon for my long delay in answering your letter of the 27th of April, relating to a land claim of "the Missionary Society of the Methodist Episcopal Church," at the *Dalles of the Columbia*, in Oregon. My first impression was that the claim presented a *question of legal title to land*, judicial entirely, and not proper to be determined by any executive department. But, desiring to treat with all respect the questions which you propound to me, I have caused careful examination to be made before proceeding to act upon ~~that~~ pre-conceived opinion.

Your letter contains a statement of facts, which I suppose to be drawn from the evidence which the parties before you chose to offer; but it does not appear that those are the only facts in the case, and the evidence offered to you the only evidence applicable to the case. But enough

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Land Claim of the Missionary Society.

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does appear to show that there are various other claims to the land there at the Dalles, which conflict, in whole or in part, with the claim of the missionary society. It appears that the Government has made a military reservation there, and that "the boundaries (of the claim) conflict with pre-emption and donation claims." And, as these claims all depend, for their validity and relative value, upon a matter of fact, that is, possession and occupancy, and the time thereof, it is manifest that the case is eminently proper for the decision of a jury in a court of law.

The title of the claimants exists only in the act of Congress of August 14, 1848, and the terms of that act, as you quote them, are "that the title to the land, not exceeding six hundred and forty acres, *now occupied* as missionary stations among the Indian tribes in said Territory, together with the improvements thereon, be confirmed and established in the several religious societies to which said missionary stations respectively belong." I do not wonder that legal difficulties should arise in attempting to execute an act of Congress so vaguely and incautiously expressed. Yet one thing is plain. If the claimants can, by proof before the proper tribunal, bring themselves within the words of the act, they have a perfect title to the land, as against the United States; and that title will be good and available as against any adverse claimant who cannot show an *older title*. The law speaks for itself, and all that the claimants have to prove to establish a perfect title to the land is, that upon the 14th of August, 1848, they did occupy the land as a missionary station among the Indian tribes in said Territory, (Oregon.) But without such proof, they have no title at all.

And thus it appears that the claim of the "religious society" presents a question purely judicial, and, in my opinion, not proper to be determined by any executive officer of the Government. Nay, no executive officer has power to determine it definitively; for whatever you or I may declare upon the subject, the losing party is not bound to submit to our judgment. If he think himself vested

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Land Claim of the Missionary Society.

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with the legal title by force of the act of Congress, he will bring his action against any one found in adverse possession, and the court which tries such a case will, of course, be bound by the statute law and the proven facts, and not by the opinion of the executive officer.

With this class of land titles—*i. e.*, direct grants by act of Congress, with no provision for after-examination by commissioners or courts—I have been forced to be somewhat familiar. The act of the 13th of June, 1812, (2 Stats., 748,) granted many lots of land to persons inhabiting divers towns in Missouri, upon the single condition of “inhabitation, cultivation, or possession, prior to the 20th of December, 1803,” (the day when possession was actually taken of Louisiana by the United States under the purchase from France.) And both the local courts and the Supreme Court of the United States, have uniformly held that the act itself is a perfect title when the required facts are found by a jury.

Under this act the General Land Office declined, for a long time, to issue patents, seeing that the act itself was a perfect title; and that, in its terms, it did not require a patent to issue.

But the act of December 22, 1854, (10 Stats., 599,) makes it lawful to issue patents upon such statutory grants, which, however, are to operate only as relinquishments on the part of the United States, and are not to interfere with the rights of adverse claimants. This act, I think, need not be considered in this case, for it does not *require* the issuing of a patent in any such case, but only permits it, makes it *lawful*, and thereby leaves it to the discretionary judgment of your Department, to be guided by the particular circumstances of each case.

Permit me to remark that a grant of public land by *statute* is the highest and strongest form of title known to our law. It is stronger than a patent, for a patent may be annulled by the judiciary upon a proper case shown—of fraud, accident, or mistake; while even Congress cannot repeal a statutory grant.



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Land Claim of the Missionary Society.

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After what has been said above, it cannot be necessary for me to give a specific answer to each one of your questions. Indeed, some of them I have no power to answer. The first, for instance, relates only to the fact whether the claimants did or did not occupy the land as a mission station on the 14th of August, 1848. I cannot answer that, because it is a question of fact, fitter for a jury than for me.

Without, therefore, answering your questions *seriatim*, I will state my conclusions in another form, which, I hope, may be found sufficient to meet the exigency of the matter now actually depending in your Department.

1. I am of opinion that the claimants have or have not legal title to the land in question by the direct force of the act of August 14, 1848, and without any action in the General Land Office. And, as to questions touching the legal construction of the act, the facts required to be proven, and quantity of the land, all these, it seems to me, are eminently proper for judicial determination, and ought to be left to the decision of the courts.

2. I do not think any executive department (not yours nor mine) is the proper judge of a disputed question of this sort, and I would decline to assume the jurisdiction by issuing a patent. And this the rather, because, if the claimants really have a good title, the patent is not at all necessary to its validity.

3. I think that the claimants ought to be left to assert their title in the courts of law, without embarrassing their case by the interference of the executive officers. This is the familiar practice in other States under similar grants; and several such cases have been re-examined and sanctioned by the Supreme Court.

I am, sir, very respectfully,

Your obedient servant,

EDWARD BATES.

Hon. J. P. USHER,

*Secretary of the Interior.*

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Platt's Case.

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## PLATT'S CASE.

The Secretary of the Interior has no legal power, after United States notes have been made legal tender by act of Congress, to pay a debt of the United States in gold.

ATTORNEY GENERAL'S OFFICE,

*June 29, 1864.*

SIR: I have the honor to receive yours of yesterday, relating to the case of Mr. H. B. Platt, of San Francisco.

It seems that in September, 1861, Mr. Platt leased to the United States, for a term of years, certain court rooms in San Francisco, at a stipulated monthly rent; that this was before Treasury notes were made a legal tender by act of Congress; that, by the depreciation of the value of Treasury notes, as compared with gold, the rent reserved has become very inadequate, and Mr. Platt is likely to sustain thereby a heavy loss. You further state that the contract has not been violated by the Government, unless the payment of Treasury notes instead of gold can be so construed. And upon this state of the case, you desire my opinion whether you can, lawfully, increase the rent, to meet the equity of his case?

Clearly not; you have no such lawful authority. It is a plain matter of contract, obligatory alike upon both contracting parties. It applies to every officer of and contractor with the Government; and as well might you and I complain that we contracted with the Government before the tender law was passed, and, therefore, have a right to demand our salaries in gold.

I am, sir, very respectfully,

Your obedient servant,

EDWARD BATES.

Hon. J. P. USHER,

*Secretary of the Interior.*

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Montano's Case.

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## MONTANO'S CASE.

An award under the convention with Peru, "payable in current money of the United States," may legally be paid either in Treasury notes or in specie.

ATTORNEY GENERAL'S OFFICE,

July 12, 1864.

SIR: Some days ago, I had the honor to receive your note of June 30, conveying to me a translation of the certificate of the arbiter in the case of Steven G. Montano, a claimant on the United States under the convention with Peru. It appears that the sum awarded to the claimant "is payable in *current money* of the United States." It also appears that the claimant requests "that the payment may be made in *specie*."

And, upon this state of the case, you ask my opinion upon the question "Whether this request can lawfully be complied with, pursuant to the terms of the certificate adverted to, in connection with the first section of the act of Congress of the 25th of February, 1862, and with similar provisions of subsequent acts, making the Treasury notes a legal tender in the payment of debts?"

This form of the interrogatory embarrasses me somewhat. If the question had been, can the said debt be lawfully paid in Treasury notes? there would have been no difficulty in answering, promptly, in the affirmative. For the act referred to makes the Treasury notes "lawful money, and a legal tender, in payment of all debts, public and private, within the United States, except duties on imports, and interest, as aforesaid," (*i. e.* on bonds and notes.)

But that is not the point propounded to me. It is, on the contrary: Can the said debt be lawfully paid in *specie*, "pursuant to the terms of the certificate" of the arbiter? Now, the terms of the certificate are, that the debt is "payable in the *current money* of the United States." And so, if *specie* be *current money*, there can be no doubt that

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Pay of Colored Soldiers.

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it is within the terms of the certificate, and that payment made in *specie* will be a *lawful* payment. And I think there can be no doubt that *specie* (by which term I understand coined metal) is current money. *Current money*, whether of metal or paper, is made such by law, and not by the mere fact of popular use, whether partial or general. There are divers acts of Congress which do, in express terms, make coins *current money*; an example of which may be found in the act of March 3, 1843, (5 Stats., 496.)

I say nothing about the policy, prudence, or economy of paying in *specie* rather than in Treasury notes, both being current money, for that is not referred to me. And I conclude that the debtor, following the terms of his obligation, has the option to pay in Treasury notes or in *specie*, for both are "current money of the United States," and payment in either kind will be *lawful*.

I am, sir, very respectfully,

Your obedient servant,

EDWARD BATES.

Hon. Wm. H. SEWARD,  
*Secretary of State.*

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PAY OF COLORED SOLDIERS.

The same pay, bounty, and clothing, are allowed by law to persons of color who were free on the 19th of April, 1861, and were enlisted and mustered into the military service of the United States between December, 1862, and the 16th of June, 1864, as are, by the laws existing at the time of the enlistment of such persons, authorized and provided for and allowed to soldiers in our volunteer forces of like arms of the service.

ATTORNEY GENERAL'S OFFICE,

July 14, 1864.

SIR: By your communication of the 24th ultimo, you require my opinion in writing as to what amounts of pay, bounty, and clothing are allowed by law to persons of color who were free on the 19th day of April, 1861, and who

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Pay of Colored Soldiers.

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were enlisted and mustered into the military service of the United States between the month of December, 1862, and the 16th of June, 1864 ?

I suppose that whatever doubt or difficulty may exist with regard to the amount of pay and allowances to which the soldiers to whom you refer are entitled, has mainly its origin in the several provisions of the act of July 17, 1862, chap. 201, (12 Stats., 599,) relative to the employment and enrolment of persons of African descent in the service of the United States. The 12th section of that statute provides "that the President be, and he is hereby, authorized to receive into the service of the United States for the purpose of constructing intrenchments, or performing camp service, or any other labor, or any military or naval service for which they may be found competent, persons of African descent, and such persons shall be enrolled and organized under such regulations, not inconsistent with the Constitution and laws, as the President may prescribe." The 15th section of the same statute enacts that "persons of African descent, who under this law shall be employed, shall receive ten dollars per month and one ration, three dollars of which monthly pay may be in clothing."

The first and main question, therefore, is, whether the persons of color referred to in your letter, who were mustered into the military service of the United States during the period of time you indicate, are "persons of African descent" employed *under* the statute of July 17, 1862, chap. 201. If they are not thus employed, their compensation should not be governed and is not regulated by the words of the 15th section of that statute, which I have just quoted.

Now, I think it is clear—too clear, indeed, to admit of doubt or discussion—that those persons of color who have voluntarily enlisted and have been mustered into our military service—who have been organized with appropriate officers into companies, regiments, and brigades of soldiers, and who have done and are doing, in the field and in garrison, the duty and service of soldiers of the

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Pay of Colored Soldiers.

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United States—are not persons of African descent employed *under* the statute to which I have referred.

I do not find, indeed, in the act any authority to enlist persons of African descent into the service as *soldiers*. It will be observed that the 12th section enumerates two kinds of employment for which those persons are authorized to be enrolled, namely, *constructing entrenchments* and *performing camp service*. The section then contains a more general authority—authority to receive such persons into the service for the purpose of performing “any *other labor*, or any military or naval service for which they may be found competent.” I am bound, however, by every rule of law respecting the construction of statutes, to construe these words of more general authority with reference to the character, nature, and quality of the particular kinds of labor and service which are, in the first instance, specifically enumerated in the statute, as those for the performance of which persons of African descent are authorized to be received into the service; and therefore I must suppose that Congress, when it conferred authority upon the President to receive into the service of the United States persons of African descent for the purpose of performing any other labor or any military service for which they may be found competent, meant and intended that that other labor and that other military service should be of the same general character, nature, and quality as those which it had previously in the statute specially named and designated. “Always in statutes,” says Coke, “relation shall be made according to the matter precedent.” Dwarris says: “Sometimes words and sections are governed and explained by conjoined words and clauses—*nocitur a socio*.”—(Dwarris on Stat., 604.)

Applying these rules of construction, then, to the act before me, I am constrained to hold that, if the authority to enlist and muster into the military service soldiers of African descent depended upon this statute, (as it does not,) it would furnish no foundation for such authority. It is manifest that the labor and service that United States

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Pay of Colored Soldiers.

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soldiers are enlisted to perform are of an essentially different character from, and are essentially of a higher nature, order, and quality than, those kinds of labor and service specifically named in the statutes, and for the performance of which the President is specially authorized to employ "persons of African descent." In my late opinion in the case of the claim of Rev. Samuel Harrison for full pay as chaplain of the 54th regiment of Massachusetts volunteers, I expressed the same view when I said that the act of July 17, 1862, chapter 201, "was not intended either to authorize the employment or to fix the pay of any persons of African descent, except those who might be needed to perform the humbler offices of labor and service for which they might be found competent."

This view finds confirmation in a statute that received the approval of the President on the same day as the act before me—the statute of July 17, 1862, chap. 195, (12 Stats. 592)—which conferred on the President the authority to employ as many persons of African descent as he might deem necessary and proper for the suppression of the rebellion, and gave him power to organize and use them in such manner as he might deem best for the public welfare. In these words we may find clear and ample authority for the enlistment of persons of African descent as United States soldiers. It is under this act, if under either of the acts of July 17, 1862, that colored volunteer soldiers may be said to have been employed. There is no need to resort, therefore, to the statute of July 17, 1862, chap. 201, for any authority with respect to their employment, or for any rule in regard to their compensation. Persons of African descent, employed as soldiers, are not embraced at all, as I have shown, by the act of July 17, 1862, chap. 201, as objects or subjects of legislation; and we must, therefore, look to some other law for the measure of their compensation.

I find the law for the compensation of the persons of color, referred to in your letter to me, in the acts of Congress in force at the dates of the enlistments of those per-

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Pay of Colored Soldiers.

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sons, respecting the amount of pay and bounty to be given, and the amount and kind of clothing to be allowed, to soldiers in the volunteer forces of the United States. For after a careful and critical examination, I believe, of every statute enacted since the foundation of the present government relative to the enlistment of soldiers in the regular and volunteer forces of the United States, I have found no law which, at any time, prohibited the enlistment of free colored men into either branch of the national military service. The words of Congress descriptive of the recruits competent to enter the service were, in the act of April 30, 1790, "able-bodied men not under five feet six inches in height without shoes; not under the age of eighteen, nor above the age of forty-five;" in the act of March 3, 1795, "able-bodied, of at least five feet six inches in height, and not under the age of eighteen, nor above the age of forty-six years;" in the act of March 3, 1799, "able-bodied and of a size and age suitable for the public service, according to the directions which the President of the United States shall and may establish;" in the act of March 16, 1802, "effective, able-bodied citizens of the United States, of at least five feet six inches high, and between the ages of eighteen and forty-five years;" in the acts of December 24, 1811, January 11, 1812, January 20, 1813, and January 27, 1814, "effective, able-bodied men;" in the act of December 10, 1814, "free, effective, able-bodied men, between the ages of eighteen and fifty years;" and in the act of January 12, 1847, "able-bodied men." Some of the foregoing statutes are obsolete; others of them are still in force, and furnished, before the suspension of the writ of *habeas corpus*, the rule by which the validity of the enlistments of persons alleged to have been minors was every day tried in the State and Federal courts. They organized the military establishment of the United States in time of peace and in time of war. They embrace the periods of all the wars, previous to the present, in which the United States has been engaged. By no one of them was or is the enlistment of free colored men in the military



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Pay of Colored Soldiers.

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service of the United States, whether as volunteers or as regulars, prohibited. After the war of 1812, claims for bounty land preferred by persons of color who had enlisted and served in the army under the statutes of December 24, 1811, January 11, 1812, and December 10, 1814, were sustained as valid by the then Attorney General, William Wirt, (1 Opin., 603.) And when I turn to more recent statutes, those which authorized the raising, and regulate the organization of the whole body of the volunteer forces now in the field, and provided for the maintenance and increase of the regular forces in the service, I discover throughout them no other statutory qualifications for recruits than those established by the earliest legislation to which I have referred.

It is not needed that I should recite the words of those acts of Congress that provide for the pay, bounty, and clothing to be allowed to soldiers in the volunteer military service of the United States. It is enough to say that, under the statutes relative to those subjects and in force during the period of time mentioned in your communication, all volunteers, competent and qualified to be members of the national forces, are entitled respectively to receive like amounts of pay, bounty, and clothing from the Government.

In view, therefore, of the foregoing considerations, I give it to you unhesitatingly, as my opinion, that the same pay, bounty, and clothing are allowed by law to the persons of color referred to in your communication, and who were enlisted and mustered into the military service of the United States between the month of December, 1862, and the 16th of June, 1864, as are by the laws existing at the time of the enlistment of said persons, authorized and provided for and allowed to *other* soldiers in the volunteer forces of the United States of like arms of the service.

I am, sir, very respectfully,

Your obedient servant,

EDWARD BATES.

The PRESIDENT.

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Sioux Half-breed Reservation in Minnesota.

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## SIOUX HALF-BREED RESERVATION IN MINNESOTA.

1. The State of Minnesota, by the grant to her of sections 16 and 36 in every township of public lands in the State, acquired no title to township sections 16 and 36 within the Sioux Half-breed Reservation, west of Lake Pepin, as against the holders of scrip issued to the Half-breeds of the Sioux Nation in exchange for their interest in the said reservation under the act of July 17, 1854, chap. 83.
2. The Government, like an individual, has no power to withdraw or annul its grant of land. The first lawful grant must stand; and the second cannot operate as a conveyance, for the reason that the grantor, when he made it, had no estate to convey.

## ATTORNEY GENERAL'S OFFICE,

July 21, 1864.

SIR: I have the honor now to give you my views upon the questions stated in Mr. Otto's communication of the 15th of February last, and which were submitted to me, by your direction, for my consideration and opinion.

The statement of facts contained in this communication presents the following case:

Under the 9th article of the treaty of July 15, 1830, with certain tribes of Indians, (7 Stats., 330,) a large tract of land lying west of Lake Pepin and the Mississippi river was set apart for the occupancy of the half-breeds of the Sioux nation, and by an act of Congress, approved July 17, 1854, (10 Stats., 304,) the President was authorized to cause land scrip to be issued to the said half-breeds, to exchange with them for their interest in the said tract of land.

The act of July 17, 1854, provided for the location of the said scrip in these words:

"Which said certificates or scrip may be located upon any of the lands within said reservation not now occupied by actual and *bona fide* settlers of the half-breeds or mixed bloods, or such other persons as have gone into said Territory by authority of law, or upon any other unoccupied lands of the United States subject to pre-emption or private sale, or upon any other unsurveyed lands not reserved by Government, upon which they have respectively made improvements."

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Sioux Half-breed Reservation in Minnesota.

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A quantity of scrip equal to the area of the said tract of land was prepared, which was issued and delivered to the individuals entitled in equal shares, and receipted for by them, principally in the spring of 1857, though some small portions were not delivered for two or three years afterwards. Upon the receipt of the scrip, the several individuals executed a formal relinquishment of their right, title, and interest in the said tract, pursuant to the said act of July 17, 1854.

On the 26th day of February, 1857, sundry propositions were made by the United States (11 Stats., 167) to the convention of the people of Minnesota, among which is the following:

“That sections numbered sixteen and thirty-six in every township of public lands in said State, and where either of said sections, or any part thereof, has been sold or otherwise disposed of, other lands equivalent thereto, and as contiguous as may be, shall be granted to said State for the use of schools.”

On the 29th of August, 1857, a State government was formed, which was ratified by the people of Minnesota at an election held October 18, 1857. The State of Minnesota was declared to be fully admitted into the Union by act of Congress approved May 11, 1858, (11 Stats., 285.)

Upon the foregoing facts, you say, the subjoined questions arise:

1st. Did the grant to Minnesota for school purposes pass to the State the title to those portions of sections 16 and 36, within the tract known as the Sioux half-breed reservation, west of Lake Pepin, whereto no inchoate right had attached, or did the provisions of the treaty of July 15, 1830, art. 9, (Stats., vol. 7, p. 830,) and of the act of Congress of July 17, 1854, withdraw the entire tract from the operation of said grant?

2d. If the title of the State to said sections is valid, at what date did it vest to the exclusion of subsequent claims?

Upon this statement of the case, it seems to me that the substance of your inquiry can be easily answered. I say

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Sioux Half-breed Reservation in Minnesota.

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the *substance*, because I may not correctly understand some of the phraseology of the first question. For instance, I am asked, "Did the grant to Minnesota for school purposes pass to the State the title to those portions of sections 16 and 36, within the tract known as the Sioux half-breed reservation, west of Lake Pepin, *whereto no inchoate right had attached?*" I do not understand what is meant, in this connection, by *inchoate right*. Both the parties, *i. e.*, the State of Minnesota and the half-breed Sioux, claim the land by statutory grant; the titles are of equal dignity, and if one be *inchoate* so is the other.

Again, I am asked, did the provisions of the said treaty of 1830, and the said act of Congress of 1854, "withdraw the entire tract from the operation of said grant, (*i. e.*, the grant to Minnesota?) Both the treaty and the act are direct, affirmative grants to the half-breeds. The treaty grants to them the tract designated, to hold the same "by the same title and in the same manner that other Indian titles are held." And the act of Congress of 1854, (declaring, in its first section, that the land had 'been "set apart and granted" for the use of the half-breeds by the 9th article of the treaty,) grants only to the half-breeds a change in the form and character of their title; that is, from an aggregate, common title to the whole tract, (after the manner of Indian titles,) to a personal title, in each individual, to a definite part of the same tract—this share, upon a fair division, to be held in severalty.

And thus, the treaty and the act of Congress do plainly dispose of the whole tract, subject only to the possible contingency, stated in the act, that the half-breeds, or some of them, may have located their scrip outside of the reservation. And you do not state the happening of any such contingency. Moreover, it is not stated that there are any conflicting claims of pre-emptors, or of any "other persons who have gone into the said Territory by authority of law."

I assume, therefore, that there are but two claimants—the half-breed Sioux and the State of Minnesota—to the "sections 16 and 36, within the tract known as the Sioux

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False Lists to Assessors of Internal Revenue.

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half-breed reservation;" and, as between these two claimants, I am clearly of opinion that the Sioux title is the best.

The Government, like an individual, has no power to withdraw or annul its grants of land. The first lawful grant must stand; and the second cannot operate as a conveyance, for the simple reason that the grantor, when he made it, had no estate to convey.

Being of opinion that the State of Minnesota has no title to the said sections of land, there is no occasion to answer your second question, which is only hypothetical.

I am, sir, very respectfully,

Your obedient servant,

EDWARD BATES.

Hon. J. P. USHER,

*Secretary of the Interior.*

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OFFENCE OF DELIVERING FALSE LISTS TO ASSESSORS  
OF INTERNAL REVENUE.

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1. The fines imposed, upon indictments and convictions under the 9th section of the Internal Revenue Act of July 1, 1862, enure wholly to the United States, and the collectors have no right or interest therein.
2. The offence created by the said 9th section can be tried and punished only by indictment, and not otherwise.

ATTORNEY GENERAL'S OFFICE,

July 30, 1864.

SIR: Your letter of the 20th of July, 1864, states a case, and propounds questions for my opinion thereon, as follows:

"Sundry persons have been convicted at a recent term of the district court of the United States for the northern district of New York, of *making false returns* under the 9th section of the act entitled 'an act to provide internal revenue to support the Government and to pay interest on the public debt,' approved July 1, 1862, (12 Stats., 432.) The fines assessed amount, in the aggregate, to some \$2,500,

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False Lists to Assessors of Internal Revenue.

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which, unless otherwise specially appropriated, should be paid into the Treasury of the United States, and form a part of the judiciary fund, which is placed under the control of the Secretary of the Interior.

"The collectors claim that but one moiety of these fines is for the use of the United States, and that the other moiety is for their individual use, as the first informers of the matter whereby the fines in question were incurred.

"They were such informers, and submit that their claim is recognized by the provisions of the 81st section of said act.

"As similar claims will, no doubt, be made elsewhere, I have the honor to submit for your consideration and opinion the subjoined questions :

"1. Is the fine assessed against a party convicted, upon indictment, before the proper circuit or district court of the United States, of the offence defined in the 9th section of the act aforesaid, to the sole use of the United States, or is the collector or deputy collector entitled to one-half of said fine, if he is the first informer of the cause, matter, or thing whereby the fine was incurred?

"2. Can a fine, to which the offending party is liable under the said 9th section, be assessed or recovered except upon indictment prosecuted before a district or circuit court of the United States?"

I regret to perceive that the statement of the case (leading up to the questions asked me) is not as full or as clear as I think necessary to a right understanding of the subject. You inform me that "sundry persons have been convicted at a recent term," &c., "of *making false returns*, under the 9th section of the act," (the internal revenue law) of July 1, 1862. On turning to the said 9th section, I do not find any offence described in those terms. But the offence created and made punishable by that section is expressed in different language, thus: "That if any such person shall deliver or disclose to any assessor or assistant assessor appointed in pursuance of this act, and requiring a list or lists as aforesaid, any *false or fraudulent* list or

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False Lists to Assessors of Internal Revenue.

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statement, *with intent* to defeat or evade the valuation or enumeration hereby intended to be made, such person so offending, and being thereof convicted, *on indictment* found therefor, in any circuit or district court of the United States, held in the district in which *such offence* may be committed, shall be fined in a sum not exceeding five hundred dollars, at the discretion of the court, and shall pay all costs and charges of prosecution."

I remark, in the first place, that this 9th section is a penal law, creating a penal offence, and directing the mode and measure of its punishment; and, therefore, it must be strictly followed; and, following it with any reasonable degree of strictness, it can hardly be said that the *making of a false return* is the same thing as the *delivery or disclosure to an assessor, &c., of a false or fraudulent list or statement*, with a specified intent.

Secondly. The offence stated in the said 9th section is not criminal only because it is *forbidden*, but is wrong in itself, and a crime in its nature; for it is the utterance or exhibition, to a public officer, of a false or fraudulent document, with a wicked intent. That is a crime, and therefore, very properly, required to be prosecuted only by indictment. And I think that it is the only legal method in which that offence can be prosecuted, notwithstanding what is said in the 31st section of the act.

As that 9th section is the only law which creates the crime and provides for its punishment, therefore the criminal can be punished only according to the terms of that law. And what are they? He must be "thereof convicted, *on indictment* found therefor," in a court specified. And, when so convicted, he cannot be punished by fine, except "at the discretion of the court," and "in a sum not exceeding five hundred dollars." That section has no provision in favor of informers, and under *that* alone the informer has no show of a legal claim upon the fine imposed by the court.

But the collectors, being "such informers," "submit that their claim is *recognized* by the provisions of the 31st

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False Lists to Assessors of Internal Revenue.

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section of said act." After a careful examination of the said 31st section, I am not able to concur with the collectors in the opinion that their claims to any part of the fines imposed under the provisions of section 9 are *recognized* by the provisions of section 31. Admitting that the phraseology of that section is loose and inapt, still, enough appears to show that it contains no grant of power to the collectors, whether informers or not, to meddle with the indictment for the offence created by the 9th section, or to share in its profits, nor any recognition of their right to do so.

A short analysis of the 31st section will, I think, suffice to show the fallacy of this claim. The section provides that it shall be the duty of the collectors—1. To collect all duties and taxes imposed by this act. 2. And *prosecute* for the recovery of the same. 3. And for the recovery of any sum or sums which may be forfeited by virtue of this act. 4. And all fines, penalties, and forfeitures which may be incurred or imposed by virtue of this act shall and may be *sued for and recovered*, in the name of the *United States*, or of the *collector* in whose district any such fine, penalty, or forfeiture shall have been incurred. 5. As to the forum and form of action, the proceeding must be in any proper form of action, or by any appropriate form of proceeding, before any circuit or district court of the United States for the district within which said fine, penalty, or forfeiture may have been incurred, or *before any other court of competent jurisdiction*. 6. And, where not otherwise differently provided for; one moiety *thereof* shall be for the use of the United States, and the other moiety thereof to the use of the person who, if a collector or deputy collector, shall first inform of the cause, matter, or thing whereby any such fine, penalty, or forfeiture was incurred.

In view of this brief analysis, I desire to make a few remarks, and—

1. When a grant of anything is claimed by the terms of a particular law, the claimant must take and hold it,



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False Lists to Assessors of Internal Revenue.

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if at all, according to the terms and provisions of that law, and not otherwise.

2. The claim now made by the collectors (who, you tell me, are informers) is based wholly upon that section 31, which makes it *their duty to prosecute*. And, after stating how fines, penalties, and forfeitures may be *sued for and recovered*, proceeds to dispose of the thing recovered, giving, in a certain contingency, one-half to the collector, if he happen to be the first informer. Still, he is required to *prosecute*, whether an informer or not, and nothing is given to him unless he show himself to be the *first* informer.

3. The section 31 is a single sentence, and the last clause of it (which gives the moiety to the *informing* collector, on certain expressed contingences) relates only to the subject-matter of the foregoing clauses, and *they* relate to the collector's duty to prosecute, and to the power to sue and recover, either in the name of the United States or of the collector. And the last clause of the section does but give to the informing collector "the *other moiety thereof*."

Of what? Clearly the thing which the collector has, in the line of his duty, *prosecuted for*—the thing which he has caused to be *sued for and recovered*.

4. The duty of the collector to prosecute, in the proper cases, is unquestionable, and he may do it in a variety of ways. If he be the first informer, he may bring an action in his own name, *qui tam*; or he may cause an action to be brought in the name of the United States, alleging himself as the *informer or relator*. And, in either case, his right must be stated of record, for his title is by statute, with express power to prosecute—to sue and recover. He is a legal agent, to labor in the prosecution, and not a gratuitous distributee of a fund recovered by the activity and vigilance of others.

5. Again, the 31st section gives the informing collector nothing, where the subject-matter is "otherwise and differently provided for." And I am of opinion that fines imposed, upon indictment and conviction under the 9th section, *are* otherwise provided for by the said section,

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Neutrality of the Isthmus of Panama.

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and by the general law appropriating fines imposed for offences.

6. The exclusion of the collectors from all right and power, as touching the crime created by the 9th section, will by no means leave them without the power to *prosecute* and to *sue and recover*, for the act abounds with other provisions for fines, forfeitures, and penalties which are not crimes, and which may be prosecuted, sued for, and recovered. Examples may be found in sections 11, 14, and 16 of the act.

Upon the whole, in answer to your first question, I am of opinion that the fines imposed, upon indictment and conviction under the 9th section of the act, enure wholly to the United States, and that the collectors have no right nor interest therein.

And as to your second question, I have no doubt that the offence created by the said 9th section can be tried and punished only in the manner and by the means in that section specified, and not otherwise.

All which is respectfully submitted.

I am, sir, very respectfully,

Your obedient servant,

EDWARD BATES.

Hon. J. P. USHER,

*Secretary of the Interior.*

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NEUTRALITY OF THE ISTHMUS OF PANAMA.

The 35th article of the treaty of June 12, 1848, between the United States and New Granada, binds this Government absolutely to guaranty the perfect neutrality of the Isthmus of Panama, on the demand of the proper party; and this obligation must be performed by any and all means which may be found lawful and expedient.

ATTORNEY GENERAL'S OFFICE,

August 18, 1864.

SIR: I have the honor to receive your letter of August 16, informing me that "the Minister of Foreign Affairs

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Neutrality of the Isthmus of Panama.

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of the United States of Colombia, which now comprises New Granada, has addressed a note to Mr. Burton, the United States Minister at Bogota, setting forth the expectation on the part of his government that the Government of the United States will carry into effect its guaranty of the neutrality of the Isthmus of Panama, claimed to have been stipulated in the 25th (meaning, doubtless, the 35th) article of the treaty between the United States and New Granada, of the 12th of June, 1848." And you request my opinion "as to whether the article referred to binds the United States, forcibly if need be, if required by the United States of Colombia, to interfere in their behalf to prevent the importation of troops and munitions of war across the Isthmus of Panama, for the purpose of carrying on war against Peru?"

The form of the question embarrasses me somewhat; for it is not whether the United States is bound by the said article *thirty-five* to make good the guaranty to New Granada, but whether the United States is bound, if required by the United States of Colombia, (not, in the language of the treaty, "to guaranty, positively and efficaciously, to New Granada the perfect neutrality of the before-mentioned isthmus," but) "to interfere in their behalf to prevent the importation of troops and munitions of war across the Isthmus of Panama, for the purpose of carrying on war against Peru." These two questions are very different in form, and, it seems to me, are substantially different in practical effect.

Our treaty of June 12, 1848, is with the Republic of New Granada, which, it appears, no longer exists under that name; and it is, perhaps, my fault not to know with satisfactory certainty whether the Republic of New Granada exists, in fact, under the name of the United States of Colombia, or whether the United States of Colombia do so comprehend and represent the Republic of New Granada as to be bound by its treaty stipulations, and to be entitled to the benefits of its treaty guaranties. These questions I must leave to your better information.

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Neutrality of the Isthmus of Panama.

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But as to the guaranty of neutrality contained in the 35th article of the treaty, it seems to me that there is no room to doubt its binding force upon us, if its fulfillment be demanded by the proper party. The undertaking of our Government is declared to be for a valuable consideration expressed in the treaty, and our obligation is assumed in language the most plain and positive, thus: "The United States guarantee, positively and efficaciously, to *New Granada*, by the present stipulation, the perfect neutrality of the before-mentioned isthmus." As to the best means of making the guaranty efficacious, and the neutrality of the isthmus perfect, perhaps I am not the best judge. But having assumed the obligation, I do not doubt the duty to perform it by any and all means which may be found lawful and expedient.

I need not express to you, sir, my regret at finding in the statute book a treaty which makes so great a departure (for the first time, I believe,) from the wise and cautious policy of the fathers of the Republic. This treaty assumes to guarantee not only the neutrality of the Isthmus of Panama, but also "the rights of sovereignty and property which *New Granada* has and possesses over the said territory." It is not for us, however, to complain of the onerous character of an obligation which we have voluntarily assumed. But, having assumed it, honesty and good faith require us to fulfill it. And I can but express the hope that, as this treaty is the first instance, so it may be the last, for a long time to come, of such dangerous intermeddling in the affairs of foreign nations.

I am, sir, very respectfully,

Your obedient servant,

EDWARD BATES.

Hon. WM. H. SEWARD,  
*Secretary of State.*

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Case of Colonel Gates.

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## CASE OF COLONEL GATES.

The War Department erred in disallowing the claim of Colonel Gates for servants and forage for the months of August, September, October, and November, 1861, under the 20th section of the act of August 3, 1861.

## ATTORNEY GENERAL'S OFFICE,

*August 26, 1864.*

SIR: I have the honor to say that the papers in the case of the claim of Colonel Gates, which were sent yesterday by your excellency to the Attorney General, reached this office in his absence, and I have, therefore, given the subject matter of these documents my consideration.

You desire this office to say whether the opinion rendered by yourself September 5, 1861, to the Secretary of War, touching the effect of the provision of the 20th section of the act of Congress approved August 3, 1861, is or is not a sound legal opinion. The view expressed in that opinion is as follows:

"I have examined the 20th section of the act of Congress entitled 'an act for the better organization of the army,' approved August 3, 1861, and am of opinion that officers whose cases fall within it should be paid according to the old law up to the passage of the new—August 3, 1861."

My opinion clearly is, that the view of the law thus expressed is perfectly correct. I may be permitted here to make some general observations touching the law of August 3, 1861, and to state what I suppose to have been its effect in the case of Colonel Gates.

The 20th section of the act of August 3, 1861, thus provides: "That officers of the army, when absent from their appropriate duties for a period exceeding six months, either with or without leave, shall not receive the allowances authorized by the existing laws for servants, forage, transportation of baggage, fuel, and quarters, either in kind or in commutation." There is nothing certainly in this section, nor do I discover a word in any other part of the act, which gives its provision, in any respect, a retroactive ope-

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Case of Colonel Gates.

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ration. The law, therefore, took effect at and from the date of its passage. Officers who were *then* absent are not within its provisions, unless they continued "absent from their appropriate duties for a period exceeding six months" after the 3d day of August, 1861. The time, in the case of such officers, when the six months began to run, after which they were barred the right to claim the allowances enumerated in the section, was the time when the act became a law. The law, in other words, did not take effect upon absence begun antecedently to its date, and continued to that time, but only upon absence continued *after* that time; and, in a case where the continued absence was protracted to a period greater than six months, the right of the Government to withhold the allowances in question attached at the expiration of six months from the date of the act.

Your excellency probably desired (although you do not specially request it) an examination of the papers in Colonel Gates' case, and also some expression of opinion with reference to it. I have, therefore, carefully considered his claim, so far as I have been enabled to do so, by the aid of the letters and other documents accompanying the request you make with regard to your own opinion. The papers before me are the original vouchers for the payment of Colonel Gates for the months of August, September, October, and November, 1861; three letters written by Colonel Gates—one to your excellency, two addressed to General Canby, and one to Hon. Augustus Brandegee—and a copy of the order of the Secretary of War, dated April 7, 1863, disallowing his claim. It seems by these vouchers that the allowances of Colonel Gates for servants and forage, authorized by the then existing laws, were stopped during the months of *August, September, October, and November, 1861*; and of this stoppage I understand he complains. Now, in view of that construction of the law which I deem correct and have adopted, in no event was the stoppage of these allowances, in the case of Colonel Gates, authorized by the provisions of the 20th section of

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Deposit of Ships' Papers.

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the act of August 3, 1861. The months in question were the first four months after the passage of the act. The right of Colonel Gates to receive the allowances would have ceased only at the expiration of *six months* from and after the date of the act, had he continued absent so long; so that if the fact be that he was absent from his appropriate duties during these months, his right to receive the emoluments referred to was not thereby affected. If he had remained absent after February 4, 1862, then the right of the Government under the law to stop his allowances for the time of absence subsequent to that date would have attached; but in no event, I take it, could the right attach in August, 1861, or continue till December, 1861. There would seem to have been error, therefore, in the action of the Department with regard to the allowances of this officer for the months enumerated; and, if his claim is affected by no provision of law other than the 20th section of the act of August 3, 1861, and relates only to the emoluments withheld from him in the months enumerated, I am of opinion that it should be allowed.

I return herewith the papers which you enclosed to the Attorney General.

I am, sir, very respectfully,

Your obedient servant,

J. HUBLEY ASHTON,

*Acting Attorney General.*

The PRESIDENT.

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DEPOSIT OF SHIPS' PAPERS AT PORTS IN THE BRITISH  
NORTH AMERICAN PROVINCES.

1. The master of an American vessel sailing to or between ports in the British North American Provinces is required, on arriving at any such port, to deposit his ship's papers with the American Consul.
2. The act of August 5, 1861, does not change or affect the duties of masters of American vessels, running regularly by weekly or monthly trips, or otherwise, to or between foreign ports, as imposed by the act of February 28, 1863.
3. If an American vessel is obliged by the law or usage prevailing at a

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foreign port to effect an *entry*, and she does enter conformably to the local law or usage, her coming to such foreign port amounts to an "arrival," within the meaning of the 2d section of the act of February 28, 1803, independently of any ulterior destination of the vessel, or the time she may remain, or intend to remain, at such port, or the particular business she may transact there.

4. The fees receivable by a consul for receiving and delivering a vessel's register and other papers, under the act of 1803, are prescribed by regulation of the President.
5. The act of August 5, 1861, was merely intended to limit the amount of fees payable annually to American Consuls by the masters of American vessels running, by regular trips, to or between foreign ports.

ATTORNEY GENERAL'S OFFICE,

September 7, 1866.

SIR: I have the honor to acknowledge the receipt of your letter of the 19th ult., enclosing a dispatch, No. 21, received by your Department from our consul general for the British North American Provinces, relative to the refusal of owners of certain American steamboats running to Lake Superior, and touching *en route* at Port Sarnia, in Canada, to land and receive passengers, to comply, on the requirement of the consular agent at that Canadian port, with the provisions of the 2d section of the act of February 28, 1803, and to pay the consular fees at that port, supposed to be allowed by, and demanded by the said consular agent under, the act of August 5, 1861.

From the enclosed documents, you state, a question has arisen on which you request my opinion; and it is whether the masters of American vessels running regularly, by weekly or monthly trips, to or between ports in the said provinces where consular officers of the United States may be stationed, are subject to the provisions of the 2d section of the act approved February 28, 1803, (2 Stats., 203,) requiring deposit of the ship's papers, and imposing a penalty in case of refusal, and are also liable by law for the four annual payments required by the act approved August 5, 1861, (12 Stats., 315,) regulating consular fees in certain cases.

It would have been much better, in view of the case to which the consul general's dispatch relates, if all the



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facts connected with the business and voyages of the steam-boats in question had been presented in your communication, and you had asked me whether, upon *those* facts, their case, in my opinion, is within the terms of the statute of 1803. I should then have had before me the elements from which to form a judgment upon the only question in the case of those vessels that can occasion any difficulty, namely, whether the coming of the vessels, under the circumstances attending their voyages, to the ports or places referred to, constitutes an "*arrival*" at those ports or places within the meaning of the act of Congress. The act provides that "it shall be the duty of *every* master of a ship or vessel belonging to citizens of the United States on his ARRIVAL at a *foreign port*, to deposit his register, sea-letter, and Mediterranean passport with the consul, vice consul, commercial agent, or vice commercial agent, if any there be at such port." The act further provides: "It shall be the duty of such consul, etc., on such master producing to him a *clearance* from the proper officer of the port where his ship or vessel may be, to deliver to the said master or commander, all of his said papers: *Provided*, Such master or commander shall have complied with the provisions contained in this act, and those of the act to which this is a supplement."

I know of no later statute than this, taking American vessels sailing or running to or between ports in the *British North American Provinces* from out of the operation of the act; and if there be none, then those ports, being clearly and certainly *foreign* ports, the master of every American vessel, on his "*arrival*" at one of them, is in duty bound to comply with the provisions of the law, and if he does not, is liable to pay the prescribed penalty. Nor do I know that American vessels "*running regularly by weekly or monthly trips to or between*" foreign ports are, by any provision of law, excepted out of the statute of 1803, and that the masters of such vessels are not obliged, on each "*arrival*" at the foreign ports, to deposit their papers in compliance with that statute.

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Deposit of Ships' Papers.

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The act of August 5, 1861, simply provides that such vessels "shall not be required to *pay fees to consuls* for more than *four trips in a year*, anything in the law or regulations respecting consular fees to the contrary notwithstanding." It does not change, or in *any respect* affect, the duty of the master of American vessels "running regularly, by weekly or monthly trips or otherwise, to or between foreign ports," as imposed by the act of 1803. While the masters of such American vessels are not obliged at present to pay consular fees for more than four trips in a year, they are still bound, on the occasion of every "arrival," to deposit their vessels' registers with the consuls of our Government at the foreign ports.

The difficulty, then, in the case of the vessels touching at Sarnia, relative to which the consul general writes to your Department, does not grow out of any of the circumstances I have thus adverted to, and yet they are the *only* facts to which your letter of the 19th ultimo directly refers. It is true that you have enclosed to me the dispatch of the consul general and certain letters constituting the correspondence between our consular agent at Sarnia and the owners or proprietors of the vessels in question, in relation to the liability of their masters to comply with the provisions of the act of 1803. But even these documents, I find, do not furnish any adequate statement of the facts connected with the business and voyages of the steamboats to which they relate. I glean from them simply *these* facts: that certain steamboats, owned by citizens of the United States, run "thrice weekly" from a port of the United States to Lake Superior, and touch or stop during each trip at Sarnia, a port in Canada, *to land and receive passengers*, Sarnia being a port intermediate between the port of departure—the name of which, however, is not stated—and the port of ultimate destination. It is not stated whether it is the business of the boats to carry passengers alone; nor whether the port of *ultimate* destination is a foreign or an American port; nor whether the vessels *enter*, or are ever required by the British or Colonial

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law, or by the usage of the port, *to enter*, on coming to Sarnia. However these facts may be, they have, or may have, very important relations to the question, as I have defined it, in the case of the vessels referred to. They may or may not be uniformly the same in the case of every vessel, or in case of all the voyages or trips of each vessel. The business of one vessel or voyage may present a certain combination of facts which would clearly show that when the vessel stops at Sarnia, she "arrives" there within the meaning of the act, while the contrary might appear from *another* combination of facts, that can well be imagined, with regard to the course of business, in the case of another vessel or another voyage.

You will perceive by these remarks, that until the entire case of the vessels in question is fully and fairly stated to me in the way I have indicated, I will be unable to give an opinion so general in its terms as to cover all the various and possibly varying phases of the case.

It may be discovered, however, on inquiry by the consul general, that the vessels in question are obliged to, and do actually, *enter* under the local law or usage, on coming to the port of Sarnia. My opinion is, that if that be the case, they certainly must be said to "arrive" there within the sense of the statute. So that if it should be found that the custom-house authorities at Sarnia *do* take notice of the presence of the vessels at that port, by requiring the masters to effect *entries* of their vessels on coming there, and the vessels actually are *entered* conformably to law or regulation, I am of opinion that the masters are subject to the provisions of the 2d section of the act of February 28, 1803, and are also liable to pay such consular fees as the law authorizes and provides. But I give no opinion how the law would be if the vessels do not enter at Sarnia, and there be no obligation upon their masters, under the local law or usage, to effect entries of them at that port. The duty of the masters under those circumstances might depend upon other facts and considerations, which it would be premature now to discuss.

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The general meaning of the term "arrival," as used in the 2d section of the act of 1803, has undergone judicial construction by the Supreme Court of the United States, and is the subject of recorded opinions by three of my predecessors—Attorneys General Mason, Johnson, and Cushing. (*Harrison vs. Vose*, 9 How., 372; 4 Opin., 390; 5 Id., 161; 6 Id., 163.) Mr. Cushing's opinion is the last discussion of the import of the term that I find recorded; and it was prepared after the Supreme Court had rendered judgment in a case involving the interpretation of the word, and while the opinions of Messrs. Mason and Johnson were before him. He says: "The doctrine to be collected from these authorities is, that to incur the penalty for refusal to deposit the ship's papers with the consul, &c., as commanded by the 2d section of the act of 1803, the 'arrival' there spoken of must have been or followed by entrance and clearance." (6 Opin., 168.) Whether the "authorities" to which that learned gentleman refers go to the extent which he states or not, they do give sanction to the opinion that I have just expressed, namely, that if an American vessel be obliged, by the law or usage prevailing at a foreign port, to effect an entry, and she does enter there, conformably to the requirement of the local law or usage, her coming to the foreign port amounts to an "arrival" within the purview of the 2d section of the act of 1803, whether the port in question be but an intermediate port, or whether the papers would in due course be deposited, pursuant to the command of the statute, at a port of ultimate destination, or whether the stay of the vessel at the intermediate be but for a few hours, or even for a few minutes, or whether the sole business transacted by the vessel at the foreign port be in connection with the receipt and discharge of passengers.

How the law may be regarding the entry of American vessels touching at Sarnia, or any other port in the British North American Provinces, to land and receive passengers, I do not know, nor have I any means of obtaining certain or reliable information upon that point.

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Deposit of Ships' Papers.

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The act of 1803 affixes no fee to the service which a consul performs when he receives and delivers a vessel's register and other papers; but that service is made provision for in the tariff of consular fees prescribed by the President in accordance with the provisions of the act of August 18, 1856, regulating the diplomatic and consular systems of the United States. In the schedule of consular fees now in force the consul, for the service named, is entitled to charge *one cent* on every ton registered measurement of the vessel, if under one thousand, and for every additional ton over one thousand, *one-half of one cent*. (Circular No. 49, page 12, State Department, July, 1864.)

Before the passage of the act of August 5, 1861, our consul at a foreign port was entitled to charge the fee for this service on every occasion on which the papers of a vessel were deposited with him, pursuant to the law. It was found, however, that such a fee was a burdensome charge in the case of vessels that run regularly, several times a year, from one of our own ports to a foreign port, or between foreign ports. The fee was payable to every consul, at every foreign port, where a deposit of the papers occurred. The act of 1861 was passed to obviate this supposed evil, and to meet the cases of American vessels thus running regularly, by weekly or monthly trips, to or between foreign ports; and it provides that the master of such vessels "shall not be required to pay fees to consuls for more than *four* trips in a year." The act was not designed, as I have said, to affect in any way the duty of the masters of such vessels as imposed by the act of 1803. It simply limits, in the case of such vessels, the number of the occasions on which our consuls at foreign ports are entitled to charge the prescribed fee for receiving and delivering the papers of the vessels. The papers of an American vessel touching regularly at a foreign port are to be deposited with the consul of our Government, or his representative, whenever she "arrives" at the port, within the purview of the act of 1803, but the consul there is not en-

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Compensation of District Attorneys.

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titled to receive from the master of such a vessel the fee to which I have referred more than four times in a year.

I return herewith the documents enclosed in your communication, to which I have now replied.

I am, sir, very respectfully,

Your obedient servant,

EDWARD BATES.

Hon. W<sup>m</sup>. H. SEWARD,  
*Secretary of State.*

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COMPENSATION OF DISTRICT ATTORNEYS.

1. The fees received by the District Attorney for the Southern District of New York, for services in confiscation cases, constitute a part of his official emoluments, and as such must be accounted for, pursuant to the 3d section of the act of February 26, 1853.
2. The 21st section of the act of June 30, 1864, allows a district attorney, in addition to his maximum compensation or salary, to retain three thousand dollars from the moneys received for services in prize cases during the year ending June 30, 1864.

ATTORNEY GENERAL'S OFFICE,

*September 12, 1864.*

SIR: By your communication of the 27th ultimo, you submit for my consideration and opinion two questions of law: The one touching the effect and operation of the act of August, 1861, "in relation to the office of attorney of the United States for the southern district of New York;" (12 Stats., 317;) the other relative to the construction of the 21st section of the act approved June 30, 1864, "to regulate prize proceedings," and for other purposes. (Stat. 1863-64, p. 21.) These questions arise, as you state, in the matter of the official accounts of fees and emoluments of E. Delafield Smith, Esq., attorney of the United States for the southern district of New York.

You inform me that your Department "has announced the rule that emoluments received by district attorneys for services in confiscation cases form a part of their official emoluments, and as such must be accounted for, pursuant

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to the 3d section of the act of February 26, 1853;" and that Mr. Smith, conceding the soundness of this rule in regard to other district attorneys, insists that it is not applicable to his case, by reason of the act of August 6, 1861.

The first question, therefore, which you ask me is: "Assuming the rule of the Department touching emoluments in confiscation cases to be correct, so far as it applies to such district attorneys as do not receive a fixed salary of six thousand dollars per annum, is there anything in the said act of August 6, 1861, which excludes or prevents the operation of that rule in the case of the attorney of the United States for the southern district of New York."

The second question propounded to me is: "Does the 21st section of the said act of June 30, 1864, allow a District Attorney of the United States, in addition to his maximum compensation or salary theretofore fixed, to retain a sum not exceeding three thousand dollars from the amount he has received for services in prize cases during the year ending on that day?"

I now give you my opinion upon the foregoing questions.

The act of August 6, 1861, is a statute expressly and exclusively in relation to the compensation and accounts of the Attorney of the United States for the Southern District of New York. It is in the nature of a private act, and should be construed with constant reference to the objects sought by the statute to be accomplished. Those objects were two: *firstly*, to provide a fixed annual compensation, and one that would be adequate to his service, for that officer; *secondly*, to provide a fund for the payment of the proper expenses of his office, without subjecting the personal official emolument of the district attorney to any diminution. It was therefore enacted that there shall be paid to the Attorney of the United States for the Southern District of New York (1.) "a salary at the rate of six thousand dollars per annum;" (2.) "such additional sum as shall be necessary, *together with the costs and fees now allowed by law*, to pay such amount as shall be

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fixed by the Secretary of the Interior *for the proper expenses of the office*, including salaries of assistants and clerks." The law officer of the Government in New York was thus *secured* a compensation equal in amount to the highest that any district attorney was capable of receiving, and supposed to be commensurate with his professional labor, which could not be affected by the amount of business passing through his office; and, at the same time, provision was made to relieve him from any liability for the payment of any part of the expenses incident to the proper conduct of that business. The "proper expenses" of the office, it was provided, should be fixed by the Secretary of the Interior. If the costs and fees allowed by law for the various official services of the officer should, in any year, be no more than adequate to the defrayment of those expenses, the district attorney, under the act, should receive the amount of such costs and fees, to be appropriated, however, in the manner and for the purpose designated. If, in any year, the costs and fees allowed by law for such services were deficient in amount, and not adequate to the payment of the expenses of the office thus fixed by the Secretary of the Interior, in that event, it was provided the district attorney should receive an *additional sum*, which, together with the costs and fees, would be equal in amount to the ascertained expenses of the office for the year. But should the official business yield in any year an *excess* of fees and costs over and above the authorized expenses of the office, the surplus ascertained to be in the hands of the district attorney on the adjustment of his accounts, would, under the act, be payable to the Government, for the salary of six thousand dollars provided by Congress was meant to be *in lieu* of all other official compensation.

It appears from this analytical view of the act of August 6, 1861, that Congress meant to place, and did place, the office of attorney for the southern New York district, with respect to the compensation of the attorney, on a peculiar footing; and whether its action was politic and wise or not, the intention and purpose of Congress must be upheld



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so long as we find them unaffected and unaltered by subsequent acts. Since the date of the act of 1861, however, several new classes of business have grown up under the legislation of Congress, which have been placed in the hands of the local law officers of the Government. One class is under the act of July 17, 1862, providing for the seizure and condemnation of the property of certain persons in hostility to the United States, which enacts that in proceedings instituted in the several district courts to secure the condemnation of such property, "the said courts shall have power to allow such fees and charges of their officers as shall be reasonable and proper in the premises." The fee bill of 1853 does not, therefore, furnish the rule by which a district attorney shall charge, or by which he shall be allowed, compensation for his services in this new class of cases. The court is to say, with respect to such services, what fees are reasonable and proper. But the fees and charges thus allowed to a district attorney in proceedings under this act are within the legal designation of "the fees and emoluments of his office; as such they are to be embraced in the return prescribed by the 8d section of the act of 1853; and, as such, are not receivable in addition to the maximum compensation allowed by that act, but constitute a part of that maximum compensation, *unless, indeed, it should be ascertainable from the words of the act of 1862 that Congress has differently ordered.*

I am relieved by your letter from the necessity of considering the effect of the act of 1862 with respect to district attorneys other than the attorney for the southern district of New York; but I am asked to say whether that district attorney is entitled to receive, by the effect of the act of August 6, 1861, to his own use, in addition to his annual salary, the fees that may be allowed him under the 8th section of the act of July 17, 1862, or whether said fees should be returned and accounted for by him as part of the costs and fees appropriated by the act of 1861, to pay the ascertained "*proper expenses*" of his office. The argument, I suppose, would be, on the part of the district at-

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torney, that inasmuch as by the very terms of the act of August 6, 1861, the costs and fees "*now allowed by law*" were appropriated to defray the expenses of his office, and inasmuch as the fees and charges receivable under the act of July 17, 1862, were not then—at the date of the act of August 6, 1861—allowed by law, those fees are not, by or under the act of 1861, thus appropriated, but accrue to him individually.

Now, with respect to this position, I will make *two* remarks: First. I observe, assuming, if we may, that costs and fees allowed by laws enacted subsequently to the date of the act of 1861, are not contemplated and are not appropriated by that act for the purpose indicated, it by no means follows that the district attorney is entitled to receive them *to his own use* in addition to his salary. The object of the act of 1861 was, as I have shown, to give the district attorney in New York a fixed annual compensation, adequate to his services, receivable as a *salary*, and not in the shape of *fees* for particular services. And I say, therefore, if the first provision of the act of 1861, namely, that providing the annual salary, stood alone, and there were no words, (as I think there are none,) in the act of July 17, 1862, indicative of an intention on the part of Congress to give the fees therein authorized to be allowed by the court to district attorneys, to the attorney of the United States for the southern district of New York, in addition to his salary, that he would not be entitled to receive, in cases of confiscation, any special or extra compensation; and that if he actually took fees allowed by the court from the funds realized in that class of cases, he would receive them as money held *to the use of the United States*, recoverable from him in an action at law.

Secondly. I observe that, although the expression in the act is "the fees and costs *now allowed by law*," Congress did not mean to limit and confine its appropriation of the official costs and fees to those simply that were allowed at the date of the statute, but intended that the appropriating

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provision should extend over all the period of time during which the annual salary was payable. Congress meant, I think, that the payment of the salary and the appropriation of costs and fees should go *pari passu*. And, as in 1862, the district attorney was entitled to his compensation of six thousand dollars, so during that year he was entitled to receive, "to pay such amount as shall have been fixed by the Secretary of the Interior for the proper expenses of the office," the fees in the year 1862, for the first time authorized, allowed him by the court in proceedings for confiscation. We have the highest authority for the rule that "in construing a statute, we must look to the *object* in view, and never adopt an interpretation that will defeat its own purpose, if it will admit of any other reasonable construction." (The Emily and The Caroline, 9 Wharton, 388.) The construction that I am inclined to put upon the act of 1861 is in perfect consonancy with the purpose of Congress, as I have before stated it, and in aid of the manifest object of the legislation.

No injustice to the district attorney is worked, I may observe, by this construction; for if great additional labor and trouble are cast upon his office by the act of July 17, 1862, the Secretary of the Interior is authorized to afford him additional professional and clerical assistance, the expenses of which would be payable out of the fees received under the act creating the new and extra duty.

My opinion, therefore, is, in reply to your first question, that there is nothing in the act of August 6, 1861, which excludes or prevents the operation of the rule of the Department in the case of the attorney of the United States for the southern district of New York.

I have no difficulty in answering your second question in the affirmative. The prize act was approved June 30, 1864. On the *next* day, July 1st, it is made the duty of every district attorney, by the 21st section, to render to your Department an account "of all sums he *shall have received* for all services in prize causes within the *previous*

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year," *id est*, the year beginning July 1, 1863, and ending on June 30, 1864; and from such sums he shall be allowed to retain "a sum not exceeding three thousand dollars, in addition to the maximum compensation allowed to be retained by him by the 3d section of the act of February 26, 1853, or in addition to any salary he may receive in lieu of such maximum compensation." The word "beginning," in short, governs manifestly, I think, the word "render," and not the word "account."

An approved author on the rules for the construction of statutes, observes: "As statutes are read without breaks or stops, it is not at any time clear that words belong to any particular branch of a sentence; it must be collected from the *context* to what they relate." (Dwarris, p. 601.) My opinion, therefore, is, that the 21st section of the act of June 30, 1864, does allow a district attorney, in addition to his maximum compensation or salary, to retain a sum not exceeding three thousand dollars from the amount he has received, for services in prize cases, during the year ending June 30, 1864.

If an argument drawn from a comparison of statutes be of any value on a question of statutory construction, I may call attention to the careful manner in which Congress here has *expressly* enacted that the sum of three thousand dollars allowed by this act of June 30, 1864, to a district attorney in *prize causes*, shall be *in addition* to his maximum compensation, or the salary that he may receive in lieu of fees, and contrast the legislation in that case with the legislation with respect to fees and charges allowed under the act of July 17, 1862, in which we have found an entire omission of any express enactment that such fees and charges are receivable in addition to that maximum compensation or annual salary.

I am, sir, very respectfully,

Your obedient servant,

EDWARD BATES.

Hon. S. P. CHASE,

*Secretary of the Treasury.*

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Claim of George W. Smith.

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## CLAIM OF GEORGE W. SMITH

A Court—one "Provisional Justice" Smith—constituted under authority of General Saxton at Beaufort, South Carolina, rendered a judgment against a Government contractor in an attachment proceeding instituted by a sub-contractor. An execution having issued thereon to the Provost Marshal of the District, it was found that the property attached had been used by Government officials in the construction of a naval dock. The sub-contractor (plaintiff) claimed that he was entitled, on the settlement of the accounts at the Navy Department, to payment of the value of the property of the defendant which had been attached and afterwards taken for the use of the Government. *Held*: that "Provisional Justice" Smith had no legal existence as a Court, and that his judgment had no legal validity, and could not control or govern the Navy Department in the settlement of the said accounts.

ATTORNEY GENERAL'S OFFICE,

September 12, 1864.

SIR: Your letter of the 7th instant has to-day for the first time come under my consideration. You send to me letters from the Chief of the Bureau of Yards and Docks, dated respectively the 8th and 27th ult., with other papers, in relation to a claim of George W. Smith, founded on the proceedings of a court constituted under military authority in the District of Beaufort, S. C.; and you request my opinion "as to the validity of the judgment of the court in question, and whether it would authorize the payment or credit to Smith, on the settlement of his account, of the value of the property *so appraised and taken*, by the order of the bureau, for the use of the Government?"

In answer, I have the honor to state that, upon examining the papers, I find a very anomalous case. It seems that one Lee contracted with the Navy Department to build a wharf at or near Port Royal, the wharf to be completed *March 22, 1863*.

The work not being completed in the time specified, the contract was, *in November, 1863*, sent over to the Bureau of Yards and Docks, and Lee was paid \$20,000 on account of his contract. In *March, 1864*, Smith came to Washington, and, claiming to be a sub-contractor under Lee, alleged that, as such, he had gone on with the work, until

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Claim of George W. Smith.

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Lee owed him a large sum of money on that account, and proposed that the Government should secure his claim.

The bureau then directed the commanding officer at Port Royal to take possession of the work, and proceed to complete it, under charge of the superintendent, Mr. Murphy; and, by agreement of Mr. Murphy, Smith proceeded to finish the wharf.

On Smith's return to Port Royal, (the exact time not stated,) he found *upon the wharf* a quantity of materials belong to Lee, and, endeavoring to make them available in payment of his alleged claim against Lee, took them.

He then "procured from Brigadier General Saxton, military governor of South Carolina, *a writ of attachment*, directed to Captain J. E. Bryant, provost marshal of Beaufort, S. C.," to attach, &c., and to summon garnishees, &c. The writ of attachment required the provost marshal to keep the goods attached, to answer a complaint of Geo. W. Smith, then pending before A. D. Smith, J. P. And the garnishees were required to appear and answer before the said A. D. Smith.

The provost marshal returned the writ according to its exigency, and also made the additional return that he had served upon Nicholas Murphy, superintendent of naval dock, Bay Point, a notice, notifying him not to pay to said Lee till further order from the *proper authority*.

The complaint was heard before Esquire Smith, (who is called in the proceedings "*provisional justice, etc.*") judgment rendered, and execution issued; to which execution the provost marshal returned, that the property attached had been taken possession of by Nicholas Murphy, under orders from the Navy Department, and was being used in the construction of a naval dock at Bay Point.

This is, substantially, a statement of the case; and upon this state of the facts I proceed to answer your question, which is, "as to the validity of the judgment of the court in question."

I have no knowledge of any law or authority by which Brigadier General Saxton could rightfully issue, or his

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provost marshal rightfully execute, any such writ of attachment as is stated in the papers; and I have no knowledge of the legal existence of any such court as a "Provisional Justice" Smith; and, consequently, I do not recognize the legal validity of the judgment actually rendered by Mr. Smith so as, in any manner, to control or govern the action of the Navy Department.

I am, sir, very respectfully,

Your obedient servant,

EDWARD BATES.

Hon. GIDEON WELLES,

*Secretary of the Navy.*

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COMPENSATION OF DISTRICT ATTORNEYS IN SUITS  
AGAINST REVENUE OFFICERS.

A District Attorney is not required to return in his emolument accounts the compensation received for services rendered, under the 12th section of the act of March 3, 1863, in suits against collectors or other revenue officers, and he is entitled to retain such compensation in addition to the maximum compensation provided by the act of February 26, 1853, or in addition to any salary he may receive in lieu of such maximum compensation.

ATTORNEY GENERAL'S OFFICE,

*September 20, 1864.*

SIR: The late Secretary of the Treasury, Mr. Chase, requested my opinion upon the question whether a district attorney is required to return in his emolument account the compensation for services rendered by him under the 12th section of the act of Congress approved March 2, 1863, or whether he is entitled to retain such compensation for his private use.

The 12th section of the statute of March 3, 1863, provides as follows: "that in all suits or proceedings against collectors or other officers of the revenue, for any act done by them, or for the recovery of any money exacted by or paid to such officer, and by him paid into the Treasury of the United States, in the performance of his official duty,

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Compensation of District Attorneys.

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in which any district or other attorney shall be directed to appear on behalf of such officer by the Secretary or Solicitor of the Treasury, or by any other proper officer of the Government, such attorney shall be allowed *such compensation for his services therein as shall be certified by the court in which such suit or proceeding shall be had, to be reasonable and proper, and approved by the Secretary of the Treasury*; and where a recovery shall be had in any such suit or proceedings, and the court shall certify that there was probable cause for the act done by the collector or other officer, or that he acted under the direction of the Secretary of the Treasury or other proper officer of the Government, no execution shall issue against such collector or other officer, but the amount so recovered shall, upon final judgment, be provided for and paid out of the proper appropriation from the treasury." (12 Stats., 741.)

The act of February 26, 1853, sec. 3, requires every district attorney, upon the 1st day of January and July in each year, to make to the Secretary of the Interior, in such form as he shall prescribe, "*a return in writing, embracing all the fees and emoluments*" of his office, "*of every name and character, distinguishing the fees and emoluments received or payable under the bankrupt act from those received or payable for any other service.*" The statute of 1853 then proceeds to provide that "no district attorney shall be allowed by the said Secretary of the Interior to retain *of the fees and emoluments of his said office, for his own personal compensation*, over and above his necessary office expenses, the necessary clerk-hire included, to be audited and allowed by the proper accounting officers of the treasury, *a sum exceeding six thousand dollars per year*, and at and after that rate for such time as he shall hold the office." (10 Stats., 165.)

The question which has been referred to me for my opinion by your Department is, whether the foregoing provisions of the act of 1853 are applicable to the moneys received by district attorneys as compensation for services in the class of suits referred to in the 12th section of the



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act of March 3, 1863; whether such moneys should or should not be embraced by district attorneys in the semi-annual returns which they are required to make to the Secretary of the Interior of "all the fees and emoluments of their respective offices;" and whether such moneys are or are not receivable by those officers in addition to the maximum compensation which they are allowed to retain by the 3d section of the act of 1858?

There is one district attorney, I may observe, for whose compensation Congress has made special provision. The Attorney of the United States for the southern district of New York, under the act of August 6, 1861, (12 Stats., 317,) is allowed "a salary at the rate of six thousand dollars per annum, and such additional sum as shall be necessary, together with the costs and fees now allowed by law, to pay such amount as shall be fixed by the Secretary of the Interior for the proper expenses of the office including salaries of assistants and clerks."

The question stated in the letter of the late Secretary of the Treasury is a general one; it is asked with respect to all district attorneys; and it is proper, therefore, in referring to the various provisions of law which affect the question submitted, to make mention of the special act which fixes and regulates the compensation of the attorney for the southern district of New York.

The question submitted to me, so far as it arises in the case of that officer, would be, whether he is permitted to receive to his own use such sums as may be allowed him by virtue of the 12th section of the act of March 3, 1863, *in addition* to his annual salary of six thousand dollars, or whether those moneys should be accounted for, and returned by him, as part of the "costs and fees" appropriated to pay the "proper expenses" of his office.

At the time I had the honor to receive the letter of the late Secretary of the Treasury, the question which he submitted was one purely of statutory construction, and was determinable only upon a careful and critical examination of the various provisions of all the statutes to which I

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have now referred; and my opinion was, and is, after an examination of these statutes, that the intention of Congress was to give to a district attorney, in addition to the maximum compensation allowed to be retained by him by the 3d section of the act of February, 1853, and (in the case of the attorney for the southern district of New York) in addition to his annual salary receivable in lieu of such maximum compensation, the amount that he may receive upon the allowance of the court, with the approval of the Secretary of the Treasury, for services performed in suits against collectors or other revenue officers, by virtue of the 12th section of the act of March 3, 1863.

It will be observed that the 13th section of the act makes it the official duty of the respective district attorneys, unless otherwise instructed by the Secretary of the Treasury, to appear on behalf of such officers. An obligation is then imposed on the several district attorneys, on the first of October of each year, to make returns to the Solicitor of the Treasury of the number of such suits commenced, pending, and determined within their districts during the fiscal year next preceding the date of such returns, which the act provides, "shall be embraced in a report by the Solicitor to the Secretary of the Treasury, to be by him annually transmitted to Congress, *with a statement of all moneys received by the Solicitor, and by each district attorney, under the provisions of this act.*" I see clearly in these provisions the legislative intent that I have just mentioned. Why impose, it may be asked, upon the Secretary of the Treasury the duty designated, if it was contemplated that the allowances referred to were all to pass, under the act of 1853, into the semi-annual returns of district attorneys, and to undergo, on the settlement of those returns, the inspection of the Secretary of the Interior? In that event, however large the compensation might be that the court had allowed him, under the authority of the act, the ability of the district attorney to take advantage of it would always be controlled by the operation of the 3d section of the act of 1853. I can discover, in a word, no reason why

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Congress should require to be informed, or should, indeed, desire to know, how much of every district attorney's annual maximum consisted of allowances for services in suits against revenue officers any more than of his fees for other public business with which he is charged; while, on the other hand, I can readily discern the motive and purpose of Congress in requiring these statements, the effect which such a requirement would naturally have upon those concerned in making the allowances, and the uses which the information contained in the annual reports of the Secretary of the Treasury would readily serve, if we assume that Congress contemplated that the moneys in question were to be received by district attorneys to their individual use.

The statute, furthermore, requires the Secretary of the Treasury to state to Congress each year how much money every district attorney "*received*" from the source of emolument created by the act—not, it will be observed, how much he was "*allowed*," but what was "*received*" by him. It is plain that, during a year in which the district attorney earned more than his maximum compensation, the amount *allowed* him by the court and the Secretary of the Treasury in this class of cases would not represent at all the amount received by him for his services. The preparation of such a statement as the act requires for that year, would involve an examination by the Secretary of the Treasury into the condition of all the accounts of the district attorney presented to, and settled by, the Secretary of the Interior, the ascertainment of the whole amount of his fees and emoluments for the period in question, and the discovery of what proportion of the entire maximum compensation consisted of moneys received under this, and what under the other acts of Congress; and that, too, without having in his immediate possession any of the materials for such an inquiry. I cannot think that Congress meant to impose, in any event, upon the Secretary of the Treasury such a duty as this. The inference, not strained or forced, but plain and natural, would appear,

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then, to be, that it was not the intention of Congress to subject these allowances to the operation of the rule of the statute of 1853.

While the foregoing considerations would appear to be mainly applicable to the case of such district attorneys as do not receive a fixed annual compensation for their official services, they are in reality equally weighty when brought to bear upon the case of the attorney for the southern district of New York.

Such were the views I held before the passage of the act of June 27, 1864, (Stats. 38th Congress, sess. 1, chap. 103,) the 2d section of which enacts "that no district attorney shall, by reason of the discharge of the duties of his office now or hereafter required of him by law, or in any case in which the United States will be bound by the judgment which may be rendered in the same, be allowed to retain out of the fees, charges, and emoluments thereof, whether prescribed by statute or allowed by a court or any judge thereof, a greater maximum compensation than that fixed by the act aforesaid; but all such fees and emoluments, of every name and character, shall be included in the semi-annual returns required by the 3d section of the act aforesaid"—the act of February 26, 1853. But the section at the same time provides "*that nothing in this act contained shall apply to the provisions of sections eleven and twelve of the act to prevent and punish frauds upon the revenue, approved March third, eighteen hundred and sixty-three.*"

The effect of this proviso, therefore, is to entitle a district attorney to receive, in addition to his maximum compensation, free of liability to account for it in his semi-annual returns, the compensation awarded to him by virtue of the 12th section of the act of March 3, 1863. This proviso contains a declaration of the legislative intention with respect to that compensation. It is unnecessary that I should trouble you or myself with the question whether this enactment should be given a retrospective operation or not, for I have already said that, in my opinion, there was sufficient, within the four corners of the act of 1863,

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Claim of Admiral Lee.

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to show that Congress had originally the same intention as is declared in this proviso.

Upon the whole, I am of opinion that a district attorney is not required to return in his account of fees and emoluments the compensation received for services rendered by him under the 12th section of the act of March 3, 1863, and that such compensation he is entitled to retain for his private use, in addition to the maximum compensation allowed to be retained by him by the 3d section of the act of February 26, 1853, and in addition to any salary he may receive in lieu of such maximum compensation

I am, sir, very respectfully,

Your obedient servant,

EDWARD BATES.

Hon. Wm. P. FESSENDEN,

*Secretary of the Treasury.*

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CLAIM OF ADMIRAL LEE.

On a question as to the distribution of the proceeds of certain prize property captured by the United States Steamer Santiago de Cuba, Captain Glisson, on the 29th and 30th of June, and the 1st of July, 1864, it was *held*, that the capturing vessel was under the "immediate command" of Admiral Lee, as Commander-in-chief of the North Atlantic blockading squadron; and that Admiral Lee was entitled, under the act of July 17, 1862, to one-twentieth part of the prize money awarded to the vessel making the capture.

ATTORNEY GENERAL'S OFFICE,

*September 27, 1864.*

SIR: Your communication of the 26th ultimo, transmitting to me a letter addressed to your Department by Acting Rear Admiral Lee, dated 15th ultimo, with the accompanying papers, requests my opinion upon a question touching the distribution of the proceeds of certain property captured as prize of war by the United States steamer Santiago de Cuba, (Captain Glisson commanding,) between the 23d of June and the 2d of July last.

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Claim of Admiral Lee.

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The question is one moved between Admiral Lee and Captain Glisson, and it is, in effect, whether the *Santiago de Cuba*, at the times of the respective captures, was under the "*immediate command*" of Admiral Lee, as commanding officer of the North Atlantic blockading squadron, within the meaning of the 3d section of the act of July 17, 1862, chap. 204, "for the better government of the navy."

The 3d section of that act provides, "that the prize money belonging to the officers and men shall be distributed in the following manner:

"First. To the commanding officer of a fleet or squadron, *one-twentieth* of all prize money awarded to the vessel or vessels under his immediate command.

"Second. To the commander of a single ship, *one-tenth* of all prize money awarded to the ship under his command, if such ship at the time of making the capture was under the immediate command of the commanding officer of a fleet or squadron, and *three-twentieths* if his ship was acting independently of such superior officer."

The general outline of the case presented in the documents before me is as follows:

The *Santiago de Cuba*, on the 29th or 30th of last June, and on the 1st of last July, picked up or captured at sea, off the coast of North Carolina, a number of bales of cotton, which her commander, Captain Glisson, thereupon sent to the port of Philadelphia for adjudication as prize of war. Admiral Lee claims that, at the dates of these respective captures, the *Santiago de Cuba* was, within the meaning of the act of July 17, 1862, a vessel under "his immediate command," as the commanding officer of the North Atlantic blockading squadron; and that he is thus entitled to *one-twentieth* of the prize money awarded to Captain Glisson's vessel on account of the said captures; which claim is resisted by Captain Glisson, who contends that his vessel, at the times of making the said captures, was not under the immediate command of Admiral Lee, but was acting independently of that officer, and that he is thus entitled, by virtue of the statute of 1862, to *three-*

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Claim of Admiral Lee.

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*twentieths* of the proceeds of the captured property awarded to the Santiago de Cuba.

The facts from which these intelligent officers of the navy arrive at such different and opposite conclusions with respect to the position and relation of the Santiago de Cuba on the days I have mentioned, are mainly these :

Captain Glisson, on the 7th of last June, was ordered by Admiral S. H. Stringham, "commandant" of the navy yard at Boston, to proceed from thence with this vessel to Hampton Roads, Virginia, and to report to the senior naval officer commanding at that station. "You will then proceed," Admiral Stringham's order concluded, "off Wilmington, North Carolina." On his arrival with the Santiago de Cuba at the Roads, Captain Glisson found Admiral Lee absent with an expedition up the James river, and, accordingly, he reported in person to the senior officer present, Captain Gansevoort, at the same time addressing a letter (dated June 18, 1864) to Rear Admiral Lee, "*commanding North Atlantic blockading squadron, near Richmond, Virginia,*" in which he reported to the Admiral his arrival at the Roads, requested *to be directed where he was to coal in future*, and stated that he would use every exertion to sail as soon as possible, and *make the blockade of Wilmington as efficient as possible*. He also stated that his vessel would be detained at the Roads for a few days on account of some necessary repairs to the machinery, and that he had left with Captain Gansevoort two of the castings of his capstan, which had broken, to have them made by the time he returned to the Roads, or to be sent to him *wherever he was ordered to coal*.

It thus appears that Captain Glisson did all that he could to place himself and his vessel under the command of Admiral Lee. He reported to the representative of the admiral in person; addressed a formal communication to the admiral, soliciting the needed order, the only then-needed order, with respect to the coaling of his vessel, directing his letter to the admiral, "near Richmond, Virginia," and expressed to him his intention to sail, in obe-

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Claim of Admiral Lee.

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dience to the order from Admiral Stringham, for the point at which he was to perform the duty assigned to him. What more Captain Glisson could have done to attach himself and his vessel to Admiral Lee's command, it would be difficult to say. It appears that Captain Glisson's letter of the 18th reached the admiral on the 21st of June, and on the *same* day he prepared his acknowledgment of the receipt of it, in which he directed Captain Glisson, among other things, to cruise off Wilmington, to capture blockade breakers, and to coal at the Roads, if he could not enter Beaufort safely. This order, however, was not actually delivered to Captain Glisson until the 2d of July. He was then off Wilmington, North Carolina. Admiral Lee states that the order was probably sent through Captain Gansevoort, and should have been delivered to Captain Glisson on the 22d p. m., or the 23d a. m. He had sailed from Hampton Roads on the 23d of June, without receiving the order he solicited. On the evening of the 24th of June, the Santiago de Cuba had arrived off Wilmington bar, and had immediately entered upon her business of blockading; and on the 29th of June she had made the first of the captures in question, about eighty miles from Baldhead light-house, at the very spot, "off Wilmington," to which she had been originally ordered to proceed; and the very place, too, contemplated in Admiral Lee's order, at which she was to cruise and capture blockade breakers. The Santiago de Cuba was then, at the time these captures were effected, doing duty within the limits of the station of the North Atlantic blockading squadron, under orders which were coincident with the undelivered orders of Admiral Lee, and of which the admiral's undelivered orders were simply confirmatory. It is conceded by Captain Glisson that, if the admiral's orders had reached him *before* the captures of the 29th of June, there could be no question as to the right of Admiral Lee to participate. His vessel, he admits, would have been on that day under the "immediate command" of the admiral of the North Atlantic blockading squadron.



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Claim of Admiral Lee.

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The question, therefore, for my consideration is, whether the actual and physical delivery to Captain Glisson of Admiral Lee's order of June 21st, was a thing absolutely necessary to be done, *under the circumstances of the case thus presented*, before the Santiago de Cuba could become, in contemplation of the statute, a vessel under the "immediate command" of Admiral Lee. I think not. I think the case stands in the same legal position as it would have stood if Captain Glisson, instead of writing to Admiral Lee, had waited upon him personally, "near Richmond, Virginia," for the purpose of reporting his arrival, and inquiring where his vessel should coal in the future, and Admiral Lee had said, "you have your order to cruise off Wilmington; I will not revoke that order, nor give you any other order now, but will send to you, at your station, direction where your vessel may take in coal while she is in my squadron;" and Captain Glisson, after such an interview as this, had made the present captures. If the captures had been made before his arrival at the Roads, there could have been no question that Admiral Lee would be excluded from sharing under the rule of the statute that prohibits the commander of a fleet from receiving any share of prizes taken by vessels "*intended to be placed* under his command before they have acted under his immediate orders." But the captures were made after Captain Glisson had reached the headquarters of the commanding admiral to whose squadron his vessel had been assigned, after he had fully reported to the admiral his coming, and solicited orders on the only point with respect to which he needed or expected to receive express direction, (for it was not in Captain Glisson's mind that Admiral Lee would revoke the previous order to proceed off Wilmington,) after the order of the admiral, subsequently delivered, had been prepared and was in the course of transmission to him, which, upon its receipt, turned out to be, as I have said, confirmatory of, and coincident with, the order from Admiral Stringham of the 8th of June, and after his vessel had been cruising for five or six days

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Claim of Admiral Lee.

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within the waters blockaded by the North Atlantic Squadron. These circumstances are enough, in my opinion, to show that Captain Glisson's vessel, at the date of the captures in question, was under the *immediate* command of Admiral Lee, the chief of the squadron. Our statutes of distribution in cases of prize are all more or less based upon the English statutes and proclamations; and the reported judicial constructions of the latter are high evidence of the true interpretation of the former. I find many English cases in the admiralty and common-law reports, not, it is true, entirely similar to the present, but which, in doctrine, support and illustrate the principle I suppose to be decisive of the case before me, that a naval vessel attached in fact to a particular squadron may be under the immediate command of the commander-in-chief of the squadron, without and before the receipt by its captain of any actual order from the commander of the squadron. For example, Admiral Digby, in July, 1782, commanded the British North American squadron. On September 7, 1782, Admiral Pigot superseded him, before which time Admiral Digby had sent out cruisers who *after* that date took several prizes. The question before Lord Mansfield, at *nisi prius*, was, whether Admiral Pigot, who had given no orders to the cruisers, but who was the commander-in-chief at the time the prizes were taken, was entitled to share. The case having been reserved at the trial, his lordship said, delivering the opinion of the court: "I have not a particle of doubt. It is no matter who gave the orders, or who sent them out. The plaintiff was commander-in-chief at the time the prizes were taken, and therefore he is certainly entitled to the prize money." (Pigot *vs.* White, in note to Johnson *vs.* Margetson, 1 H. Black., 265.)

In the case before me, the connection of the Santiago de Cuba with the squadron had been established long before the captures. In this connection and relation, within the limits of the station of the squadron, the captures were made; and I hold, under the circumstances of this case,

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**Marine Corps.**

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that it is no matter who gave the orders or who sent the vessel out, whether the Navy Department, or Admiral Stringham, or Admiral Lee, seeing that the latter was the immediate commander-in-chief of the squadron at the time the prizes were taken.

I am of opinion, therefore, that the facts to which I have now referred show that, at the dates of the captures in question, to wit, the 29th and 30th of June, and the 1st of July, 1864, the Santiago de Cuba was a vessel under the "immediate command" of Admiral Lee, as commander-in-chief of the North Atlantic blockading squadron, and that he is entitled, if the proceeds of said captures are distributable under the act of July 16, 1862, to one-twentieth part of the prize money therefrom awarded to the said vessel.

I am, sir, very respectfully,

Your obedient servant,

EDWARD BATES.

Hon. GIDEON WELLES,

*Secretary of the Navy.*

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**MARINE CORPS.**

The enlisted men of the Marine Corps are not entitled to the bounty provided by the 5th section of the act of July 29, 1861 for the men "enlisted in the regular forces."

ATTORNEY GENERAL'S OFFICE,

*September 29, 1864.*

SIR: In your letter of the 23d instant, you request to be advised whether or not the Marine Corps is to be considered as having been within the purview of the 5th section of the act of July 29, 1861, (12 Stats., 280,) which provides that "the men enlisted in the regular forces after the 1st day of July, 1861, shall be entitled to the same bounties in every respect as those allowed, or to be allowed, to the men of the volunteer forces."

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Marine Corps.

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It is not for me to judge of the justice and prudence of putting the Marine Corps upon the same footing as the regular forces of the land army, but only of the meaning of the law, as I find it written.

It seems to me very plain that the Marine Corps is not embraced within the provisions of the 5th section of the act of July 29, 1861, and that the enlisted men of that corps are not entitled to the bounty offered by that section to the men enlisted in the *regular forces*.

I observe that the commandant of the Marine Corps, in his letter to you of September 20, claims that his corps is "part of the *regular forces* of the United States." Possibly so, in a general sense; but, I think, certainly not a part of the regular forces mentioned in the said 5th section. The act of July 29, 1861, is entitled, *an act to increase the military establishment of the United States*, and its details consist entirely of provisions applicable only to the land army.

Your letter to me, in quoting from the said 5th section, does but copy the quotation made by the commandant in his letter to you; and the matter quoted, and upon which my opinion is asked, is the last clause of that section, divided from the context only by a comma. If the whole section had been quoted, I think it would have been shown conclusively that the marines are not included.

I copy the section from the statute-book, thus:

"SEC. 5. *And be it further enacted*, That the term of enlistments made, and to be made, in the years eighteen hundred and sixty-one and eighteen hundred and sixty-two, in the regular army, including the force authorized by this act, shall be for the period of three years, and those to be made after January one, eighteen hundred and sixty-three, shall be for the term of five years, as at present authorized, and that the men enlisted in the regular forces after the first day of July, eighteen hundred and sixty-one, shall be entitled to the same bounties in every respect as those allowed or to be allowed to the men of the volunteer forces."

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 Distribution of Prize Moneys.
 

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I have the honor to submit the above as my opinion upon the question propounded.

I am, sir, very respectfully,

Your obedient servant,

EDWARD BATES.

Hon. GIDEON WELLES,

*Secretary of the Navy.*

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 DISTRIBUTION OF PRIZE MONEYS.

1. The Prize Act of June 30, 1864, does not alter the rule of distribution of prize money in cases of maritime captures pending at the date of the act, but the proceeds, in those cases, are distributable according to the law existing at the time of the captures.
2. The law regulating the distribution of prize money among naval captors is a conditional grant by Congress, and as soon as the conditions are fulfilled the grant becomes absolute.

ATTORNEY GENERAL'S OFFICE,

*September 30, 1864.*

SIR: I regret that the pressure of urgent business has prevented me from sooner answering your letter of September the 8th, in which you propound a question about the distribution of prize money.

Your letter states that "the 10th section of the 'act to regulate prize proceedings, and the distribution of prize money,' approved June 30, 1864, makes essential changes in the proportions of prize money distributed to captors; and the 34th section provides that the act shall apply to all pending prize proceedings."

And upon this statement, you put to me the following question of law: "Whether this latter provision of the act extends beyond court proceedings, and applies to the proportions of prize money awarded to captors? or, whether the provision of law, as to proportions, existing at the time of the capture, governs the distribution?"

I am clearly of opinion that the latter proposition is the true law of the case: that is, that the provision of law, as to proportions, existing at the time of the capture, governs

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Distribution of Prize Monies.

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the distribution of prize money; and this for several reasons:

1. The act to which you refer (of June 30, 1864, 13 Stats., Part I, chap. 174, p. 306) does not say the contrary, and all of its detailed provisions are perfectly consistent with my view. The title of the statute is, "An act to regulate prize proceedings, and the distribution of prize money, and for other purposes." Here a distinction is taken between *prize proceedings* and the *distribution of prize money*. They are not one and the same thing, but two different things—different in design, character, and object; the one being the process by which the court is enabled to come to a judgment upon a captured vessel, whether it be prize or no prize; and the other being the disposition of the money proceeds of the prize, after final judgment and sale, among those who by law are entitled to the proceeds, and in the proportions established by the same law. They are treated of as different things, not only in the title of the act, but also in its body; for the 34th section of the act (which some suppose was designed to make a new rule of distribution in old cases) is explicit in regard to prize proceedings, but is silent as to distribution. It is couched in these few words: "That this act shall apply to all *prize proceedings* now pending," and not to the distribution of the money, after proceedings in the case are ended.

And this distinction seems to me reasonable and right; for Congress might well have thought it wise and prudent to apply to cases pending, as well as to cases thereafter to arise, the better practice and proceedings instituted by the new law, without any intention to interfere with the rights of individuals already accrued, especially as those rights are based upon past facts, which amount substantially to an executed contract with the Government.

2. It is true of all the statutes which give prize shares to the officers and men of the navy, that the shares are not of the identical things captured, that is, the ships and cargoes in kind, but of the proceeds thereof, after judicial condemnation and sale. And, as there can be no money

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Distribution of Prize Moneys.

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proceeds until the sale is made, it follows that the captors cannot have a vested interest in any specific thing, by virtue of the capture, until that event has happened. The court may fail to condemn, or the political government may intervene after capture, and before judgment, and restore the property to the claimant. And in both these cases, it is apparent that there can be no proceeds of sale, and so there can be nothing for distribution among the captors.

But this does in no sort weaken the claim of the captors to their respective shares of the proceeds, whenever the proceeds come into legal existence. Their claim is a plain, legal right, granted by act of Congress; and as the claim exists only by force of the act, it must be made and enforced according to the terms of the act. The law says, substantially, to the sailor, If you will take a ship of the enemy, and send it in for adjudication, and if it shall be condemned as prize, sold, and turned into money, you shall have such a designated share of the prize money.

The object of the law undoubtedly is to stimulate the skill, activity, and courage of the sailor; and when, acting under that stimulus, and in strict pursuance of the law, he captures a ship, and sends it in for adjudication, he has fulfilled to the letter the conditions of the governmental promise, and has perfected his right to his share of the prize money, (if any should accrue,) according to the terms, and in the proportions, prescribed by the law under which he acted. That law is a conditional grant by Congress, and as soon as the conditions are fulfilled the grant becomes absolute.

All of which is respectfully submitted.

I am, sir, very respectfully,

Your obedient servant,

EDWARD BATES.

HON. GIDEON WELLES,

*Secretary of the Navy.*

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Retirement of Medical Officers of the Navy.

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## RETIREMENT OF MEDICAL OFFICERS OF THE NAVY.

1. The 4th section of the act of July 16, 1862, chap. 183, does not authorize the appointment of an examining board to recommend the promotion or retirement of medical officers of the navy.
2. Before a medical officer of the navy is placed on the retired list, under the act of April 21, 1864, chap. 63, it should appear that his case has been acted upon by both the boards provided for in that act, and that both of them failed to recommend him for promotion.
3. If but one board has acted, and reported adversely upon the case of such medical officer, it is not the duty of the Secretary of the Navy to place him on the retired list.

## ATTORNEY GENERAL'S OFFICE,

October 4, 1864.

SIR: I had the honor to receive your letter of the 15th ultimo, referring to me two reports of a board of naval surgeons in the cases respectively of Surgeon Jonathan B. Bertollette and Surgeon J. H. Otis, medical officers of the navy, and asking my opinion upon the question whether, in view of the findings of this board, it is the duty of your Department, under the act of July 16, 1862, chap. 183, to place the said medical officers on the retired list of the navy.

It is stated in your letter that the reports referred to are "Reports of a board of examining officers *duly appointed* under the act of Congress entitled 'An act to establish and equalize the grade of line officers of the United States navy,' approved July 16, 1862, in the cases of two of the *medical officers* of the navy."

I have carefully examined this statute, but do not find in it any authority for the appointment of a board of examining officers, with power to inquire into, or decide upon, the propriety of promoting, or to recommend the promotion or retirement of, medical officers of the navy. The functions and duties of the "advisory board," authorized in the 4th section of the act to be appointed, are exclusively confined to the cases of the "line officers" of the navy belonging to the grades established in the 1st section of the statute, namely: rear admirals, commodores, captains, command-



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Retirement of Medical Officers of the Navy.

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ers, lieutenants, masters, ensigns, and midshipmen. The following is the language of the 4th section of the act:

"The Secretary of the Navy shall appoint an advisory board of not less than three officers, senior to those to be reported upon, who shall carefully scrutinize the active list of *line officers above*, and including the grade of masters in the line of promotion, and report to him in writing those who, in the opinion of the board, are worthy of further promotion," &c.

The 5th section then provides "that the officers recommended shall be immediately commissioned, according to their present seniority, in the following grades and numbers, viz, eighteen commodores," &c., proceeding down the list to and including the grade of ensign.

These provisions manifestly have no reference or application to any other but *line officers* of the navy of the respective grades mentioned. I cannot see, therefore, as I have said, how any board of examining officers, *duly appointed under the act of July 16, 1862, chap. 183*, has any authority to examine medical officers of the navy, or to recommend their promotion or retirement.

I would reply, then, to your question, that, in my opinion, it is not the duty of the Department, under the act of July 17, 1862, and in view of the reports submitted to me, to place the two medical officers named on the retired list of the navy.

The two medical officers referred to may, however, have been properly subjected to the examination of the board who sign the reports you have submitted to me, under the 4th section of the act of April 21, 1864, chap. 63, entitled "An act to amend an act entitled 'An act to establish and equalize the grade of line officers of the navy,' " approved July 16, 1862. This section provides "that *no officer in the naval service* shall be promoted to a higher grade therein, upon the active list, until he has been examined by a *board of naval surgeons* and pronounced *physically qualified to perform all his duties at sea*. And all officers whose cases shall have been acted upon by the afore-

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Retirement of Medical Officers of the Navy.

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said boards, and who shall not have been recommended for promotion by *both* of them, *shall be placed upon the retired list.*"

The present reports seem to be reports of a board of naval surgeons in the cases of two of the medical officers of the navy, and the examinations appear to have been directed to their respective physical qualifications to perform all their duties at sea. The finding in each case is, that the officer is not so qualified, and in one case the board simply report that they "do not recommend the officer for promotion;" while in the other case the recommendation is, that the officer be not promoted, but placed on the retired list.

The section of the act that I have copied above, however, plainly contemplates and requires that there shall have been an examination by two boards, and that both shall have failed to recommend an officer for promotion, before, in the language of the act, he "shall be placed upon the retired list." One of these boards is a board of naval surgeons, provided for in the 4th section, the words of which I have just given. The other is "a board of examining officers, to be appointed by the President of the United States." Provision is made for this board in the 1st section of the act of 1864, which enacts "that no line officer of the navy, upon the active list, below the grade of commodore, nor any other naval officer, shall be promoted to a higher grade, until his mental, moral, and professional fitness to perform all his duties at sea shall be established to the satisfaction of a board of examining officers, to be appointed by the President of the United States." The 2d section provides "that such examining board shall consist of not less than three officers, senior in rank to the officer to be examined." And the 3d section provides that the whole record and finding in each case shall be presented to the President for his approval or disapproval of the finding.

Before, therefore, a medical officer of the navy is placed on the retired list, under the provisions of this act,

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Anson Dart's Case.

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(the act of 1864,) it should appear that his case has been acted upon by two boards—one of them a board of naval surgeons, who passed upon his physical qualifications to perform all his duties at sea; the other, a board of examining officers, senior in rank to him, and appointed by the President, who considered his mental, moral, and professional fitness to perform his duties at sea; and, further, it should appear that he was not recommended for promotion by both of such boards.

Have these conditions been complied with in the cases of Surgeons Bertolette and Otis? Have their cases respectively been acted upon by *both* of the aforesaid boards? And, if so, does it appear that these officers were not recommended for promotion by both of them? You have only submitted to me the reports of the medical board, and you do not say whether any board, constituted as provided in the 1st section of the act of April 21, 1864, has acted upon their cases, and failed to recommend the officers for promotion. If the fact, however, be that but one board—a board of naval surgeons—has acted upon the cases of those officers, I am of opinion that it is not the duty of the Department, under the act of April 21, 1864, to place them, or either of them, on the retired list.

I am, sir, very respectfully,

Your obedient servant,

EDWARD BATES.

HON. GIDEON WELLES,

*Secretary of the Navy.*

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ANSON DART'S CASE.

1. The Secretary of the Interior has legal power to define the principles on which the accounting officers of the Treasury should settle and adjust the accounts of a Superintendent of Indian Affairs, under a special act of Congress, passed for his relief, directing the proper accounting officers "to settle with him on principles of equity and justice."

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Anson Dart's Case.

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2. If an accounting officer refuse to comply with the lawful instructions of the head of the proper Department, in respect to the settlement of an account, the appropriate ultimate remedy is his removal.
3. The President has no authority to perform personally the duties appropriate to the office of an Auditor or Comptroller of the Treasury, but it is his duty, and he has authority, to see that each performs the duties required of him by law.

## ATTORNEY GENERAL'S OFFICE,

*October 8, 1864.*

SIR: I have considered the case presented in the letter of Hon. Thomas Corwin, dated 2d instant, and the papers which you transmitted to me in connection with that letter.

Mr. Corwin addresses you as the attorney of Mr. Anson Dart, late superintendent of Indian affairs in Oregon, and requests, on behalf of Mr. Dart, that you will order the Second Auditor of the Treasury to adjust and settle a certain claim, preferred by his client against the Government, in the manner and according to the principles laid down by the Secretary of the Interior in that case.

The claim of Mr. Dart is before the accounting officers of the Treasury under the provisions of the special act of Congress "for the relief of Anson Dart," approved July 16, 1860, (12 Stats., 860,) which directs, among other things, the proper accounting officers of the Treasury "to settle with him upon principles of equity and justice, so as to indemnify him for all moneys paid and expenses incurred by him for the use and benefit of the Government,"

The Secretary of the Interior, it seems, being of opinion that he had authority, under the act of March 3, 1849, section 5, to exercise supervision over the Second Auditor and Second Comptroller of the Treasury, in the settlement and adjustment of accounts presented by Mr. Dart under the foregoing special act, indicated to the latter officer, (the Second Comptroller,) as early as the 21st of August, 1863, his opinion that Mr. Dart was entitled, under that legislation, to be allowed the amount of money which he might prove to have been paid for interest on sums

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Anson Dart's Case.

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borrowed by him for, and used in the business of, the United States. This opinion was given by the Secretary of the Interior in reply to the view which had been expressed by the Auditor, that such interest could not lawfully be allowed to the claimant. No action apparently having been taken by the Auditor upon the claim thus adjudged by the Secretary of the Interior to be well founded in law, if supported by fact, the Secretary, on the 18th of March last, addressed a letter to the Auditor, requesting him to report the claim of Mr. Dart, without any further delay, to the Second Comptroller, in accordance with the principles settled in his (the Secretary's) letter to that officer of the 21st of August, 1863.

Furthermore, it appears that, on the 6th of May last, the Auditor was carefully and distinctly informed again by the Second Comptroller what the decision of the Secretary on the subject of this claim was, and he was requested to cause an account to be stated, in conformity with the view of the Secretary, for whatever sum might be due, under that decision, to Mr. Dart, stating in the report that it was allowed by the decision of the Secretary of the Interior.

On the 13th of June last, it appears by a letter of that date from the Second Comptroller to the Secretary of the Interior, the Auditor informed the former verbally that pressure of business in his office had prevented action upon Mr. Dart's claim.

Under these circumstances, the Secretary of the Interior applied to the Secretary of the Treasury, stating that he believed, from various circumstances, that the Auditor, though hitherto excusing his delay on the ground of want of time and the pressure of business in his office, had not intended, and did not intend, to settle the account in accordance with the instructions of the Department, and requesting the Secretary of the Treasury to exert his supposed authority over the accounting officers, to induce, on the part of the Auditor, a compliance with the instructions given by the Department of the Interior.

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Anson Dart's Case.

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This request the Secretary of the Treasury refused, and he has declined to give the desired instructions, or any instructions, to the Auditor in the matter of Mr. Dart's claim.

I am not able to say, from the papers submitted to me, whether the Auditor *has or has not declined* to adjust Mr. Dart's claim conformably to the principles enunciated by the Secretary of the Interior. A long time, it is true, has elapsed since the original reference of the matter to him; but it is stated by the Comptroller (a fact to which I have already referred) that in *June last* the Auditor said to him verbally that the pressure of business had been so great in his office that he had been unable to take any action on Mr. Dart's claim without the postponement of others having priority.

Under these circumstances, my duty would seem to be best performed by making a few general remarks upon the relative powers and duties of the officers between whom this conflict of authority has apparently arisen.

The authority of the Secretary of the Interior to give the Auditor the instructions which have been referred to, and the duty of the Auditor to obey them, are entirely and equally clear, upon principles enunciated time and again by this office. I had occasion, in an opinion which I rendered to the Secretary of the Interior in this very case of Mr. Dart, so long ago as April 25, 1862, to notice all the opinions of my predecessors touching the jurisdiction of the heads of the several executive departments over the accounting officers of the Treasury in respect to the adjustment of accounts arising out of, and in connection with, the subjects placed by law under the administration and control of their respective departments. The question before me on that occasion was as to the power of the Secretary of the Interior to revise and correct the settlement of an account presented by Mr. Dart under the act passed for his relief, after the account had gone through the hands of the accounting officers, and to refuse to make requisition for the payment of the claimant if, in the judgment

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Anson Dart's Case.

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of the Secretary, he was not entitled to the allowances granted by the accounting officers. I expressed then the opinion that such authority resided with the head of that Department. I am equally clear, upon the same principle, that the Secretary of the Interior had competent authority, in advance of the settlement of the present account, to direct the accounting officers as to the manner, and with respect to the principle, on which it should be adjusted. The authority of the Secretary to interfere, *a priori*, as Mr. Crittenden, in his elaborate opinion on this subject expressed it, is as clear as was his power to interfere, *a posteriori*, in the matter of Mr. Dart's claim. (5 Opinions, 636.)

The Secretary having given his directions to the Auditor, it became then the duty of the Auditor to obey them. The duty of the latter to obey proceeds from the authority and right of the other to direct. It is alleged that he has refused to obey the mandate of the head of the Interior Department. If that be the fact—a question which I do not, as I have said, determine—the case presented is the simple one of willful neglect on the part of an officer of the Government to perform his duty. In such a case, the ultimate remedy for the evil, where the officer is appointed and removable by the President, is a very plain one.

The President has no authority to perform personally the duties appropriate to the office of the Auditor. He cannot state an account which it is the business of the Auditor to state, nor entertain an appeal, as has been frequently determined by this office, in respect to any question connected with, or arising out of, the settlement of such an account, whether from the decision of the Auditor or the decision of the head of a Department. But it is the high constitutional duty of the President to "take care that the laws are faithfully executed." If the faithful execution of the law in regard to the settlement of an account is frustrated by the action or non-action of an accounting officer, the appropriate ultimate remedy for the evil is his displacement, and the substitution of another in his place, through

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Anson Dart's Case.

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whom the faithful execution of the law in that regard will be insured.

A case proper for such action on the part of the President may occur—I cannot say, however, whether you will think the present is one, or not—*before*, and *without* any intervention by the President, in the form of an order from him to the accounting officer whose conduct may be the subject of complaint. The refusal of the officer to obey the President would, it is plain, be no greater official impropriety than his refusal to act in conformity to instructions lawfully given to him by any other officer of the Government. In the present case, therefore, I state it as my opinion that the Secretary of the Interior had lawful authority to give the instructions to the Auditor, and that it became the duty of that officer to proceed to perform his part in the settlement of the account in question, conformably to the instructions which he had received. And, further, it is my opinion that the persistent refusal of the Auditor to state the account in question in the manner indicated by the Secretary, would constitute, if it occurred, such neglect or violation of duty, on his part, as would properly subject him to removal from office, by the President.

But inasmuch as the foregoing remarks appear to me to cover all the legal aspects of the case presented by the papers you have submitted, I refrain from an expression of opinion on the point whether the President, in the event of the fact of the Auditor's refusal to act in the manner indicated, being truly alleged, and in view of the legal considerations here presented, will deem it right, in compliance with the request contained in Mr. Corwin's letter, to order that officer to adjust and settle the claim of Dr. Dart "in the manner, and according to the principles laid down by the Secretary of the Interior in that case."

I am, sir, very respectfully,

Your obedient servant,

EDWARD BATES.

The PRESIDENT.

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Lake Erie Pirates.

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## LAKE ERIE PIRATES.

Robbery on the lakes is piracy within the meaning of our extradition treaty with Great Britain, but inasmuch as the parties engaged in the outrages on Lake Erie were guilty of robbery and assault with intent to commit murder, the Secretary of State was advised, in view of the disputed question of piracy on the lakes, that their extradition should be demanded, at the hands of the Canadian authorities, for those offences.

ATTORNEY GENERAL'S OFFICE,

October 10, 1864.

SIR: I have had the honor to receive your letter of October 7, with General Dix's report to the Secretary of War, and other documents, in regard to certain outrages committed lately upon Lake Erie, by persons supposed to be American insurgents, lurking in the adjacent parts of Canada, and there planning there predatory excursions against both the Government and the people of the United States; and you ask my official opinion "whether their extradition *as pirates* may be demanded under the Ashburton treaty?"

This is a vexed question, which has been much considered of late years by the courts and the profession, and opposite conclusions have been reached by eminent judges and lawyers whose opinions I highly respect. I have compared their conflicting views, and carefully considered the matter, even before the origin of this particular case; and if the consequences were limited to the capture and punishment, or the escape, of a few guilty individuals; I might venture to give you my own naked opinion in the affirmative, without troubling you with citations of, and comments upon, the various authorities adduced by those who support the opposite sides; for it is my individual opinion that "their extradition, *as pirates*, may be demanded under the Ashburton treaty."

I say this, not without some hesitation, and with great deference for the contrary opinions of some wise and learned men. But fortunately the exigency of the case does not require us to put to hazard our main object in

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Lake Erie Pirates.

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this proceeding—that is, the securing of the offenders, so that they may be brought under the jurisdiction of our tribunals—by raising unnecessary questions about which (whatever we may think of them) we know that others differ very widely in their judgments. Indeed, I am informed that some high British officials are pledged to the opinion that Lake Erie is not a “sea,” and that they are unwilling to admit that *piracy* can be committed on its waters.

But, judging from the documents before me, (including the very lucid report of General Dix to the Secretary of War,) I do not doubt that the facts suffice to show a clear case of two crimes committed by those men within our unquestioned jurisdiction, either one of which, being properly proceeded on, will afford good ground for the proposed demand of the guilty parties, under the terms of the extradition treaty. And I see no reason to doubt that the British authorities in Canada will promptly, and in good faith, answer the claim. The facts, as laid before me, clearly make out the two crimes of robbery, and assault with intent to commit murder—and these are expressly named in the treaty.

Entertaining these ideas, I venture to suggest that the ends of the Government will be best answered by avoiding the disputed question of piracy on the lakes. Our object is to get possession of the offenders. When that is accomplished the parties may be prosecuted for any crimes of which they are legally guilty.

I am, sir, very respectfully,

Your obedient servant,

EDWARD BATES.

The PRESIDENT.

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Case of Judge Handlin.

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## CASE OF JUDGE HANDLIN.

In 1864, a Judge of a State Court of Louisiana complained to the President that the Governor of the State (Hahn) had removed him, without notice or cause, from his office. *Held*, that the State judiciary had jurisdiction of the case, and that the President had no legal authority in the premises.

## ATTORNEY GENERAL'S OFFICE,

October 14, 1864.

SIR: I have the honor to report to you, in regard to a letter referred to me from your Department on the 28th of September last. The letter is addressed to you officially, dated New Orleans July 30, 1864, and signed W. W. Handlin.

I need not make any remarks upon those parts of the letter which relate to politics, local or general; for these, I am sure, present no questions about which you desire opinions from me.

Aside from these, the gravamen of Mr. Handlin's complaint is, that Governor Hahn has treated him unjustly, "in removing *him*, without notice, and without cause, from the judgeship of the third district court." In another part of his letter, Judge Handlin says, "Governor Hahn had no power to take the step he did, under our constitution. He could have no power, then, except he derived it from you, the President."

I understand that Mr. Hahn is governor of the State of Louisiana, chosen by the people, and acting professedly under the constitution and laws of that State; and that Mr. Handlin was a State judge for the third judicial (municipal) district of New Orleans, within that State.

This being so, I do not perceive that the President has any duty or power to interfere between the conflicting officials of the same State government. He is not the judge of the laws and officers of the State. If, as Mr. Handlin affirms, the governor had no power, under the State constitution, to remove him from office and vacate his commission, the State judiciary alone has power to

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Captures on the Rio Grande.

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hear and determine the question of right; and if they find the governor in the wrong, and the judge in the right, they will doubtless be able to protect the judge in the enjoyment of his office, and in the legal exercise of all his legitimate functions.

I think it is a matter which belongs entirely to the State of Louisiana, and that the President has no legal authority in the premises.

All which is respectfully submitted.

I am, sir, very respectfully,

Your obedient servant,

EDWARD BATES.

The PRESIDENT.

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CAPTURES ON THE RIO GRANDE.

1. When one department of the Government has lawfully assumed jurisdiction of a particular case, any other co-ordinate department should decline to interfere with, or assume to control, its legitimate action.
2. There is no power in the Executive Government to revise and reverse the judgments of the prize or other courts of law of the United States, or to criticise and condemn their supposed errors.
3. When the courts have acquired jurisdiction of cases of maritime capture, the political department of the Government should postpone the consideration of questions concerning reclamation and indemnities until the judiciary has finally performed its functions in those cases.

ATTORNEY GENERAL'S OFFICE,

October 20, 1864.

SIR: I have this moment the honor to receive your letter of the 18th instant, covering copy of a communication to you from Mr. Burnley, her Britannic Majesty's chargé d'affaires, relating to the proceedings of the "prize court of New Orleans on the cases of certain vessels therein named, which were captured on the Rio Grande;" and you request "my views on the subject."

In promptly complying with your expressed wish to have my views on the subject, I remark, in the first place,

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Captures on the Rio Grande.

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that the objections taken by her Majesty's Government seem to rest entirely upon supposed errors in law committed by what is called the prize court of New Orleans. To that purpose the British minister remarks, (speaking of the case of the "Volant,") "her Majesty's Government cannot perceive that there was any sufficient legal justification for the condemnation of that vessel." For anything that I yet know to the contrary, the court may have erred in that particular: but it is none the less true that the ground of complaint is a question of law, subject only to judicial determination.

Of course, the Constitution of this Government, and its division into co-ordinate departments, are well known to the British Government; and I think it ought not to excite surprise that when one department of the Government has lawfully assumed jurisdiction of a particular case, any other co-ordinate department should decline to interfere with, or assume to control, its legitimate action.

"The prize court of New Orleans," mentioned in the minister's letter, I presume, can be no other than the district court of the United States for the eastern district of Louisiana; and that court is an integral part of the general plan of judicial justice established by the Constitution and the laws for the whole nation, and which embraces all subjects of legal litigation proper for examination in our judicial courts. Its judgments are subject, by law, to be revised by the Supreme Court, and to be reversed or affirmed, as may be found lawful and right. But I do not know of any power in the Executive Government to revise and reverse the judgments of the courts of law, or to criticize and condemn their supposed errors.

Strictly speaking we have no *prize courts*, (as some other nations have)—at least, we have none specially ordained to hear and determine cases arising in that branch of jurisprudence. The jurisdiction is granted, both by the Constitution and the statutes, in the broadest terms, and embraces all cases of judicial cognizance, thus:

"The judicial power shall extend to *all cases in law and*

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Captures on the Rio Grande.

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*equity*, arising under this Constitution, the laws of the United States, or treaties made, or which shall be made, under their authority \* \* \* to all cases of admiralty and maritime jurisdiction." (Con., Art. 3, sec. 2.)

Manifestly, this embraces cases in prize as well as all other cases in law and equity, and the judgments of the courts are not subject to any supervising power in the Executive Government.

It seems to me, sir, that it would be a respectful and all-sufficient answer to the minister of her Britannic Majesty to say, that the President has no power to control the judgments of the courts of law; and, therefore, that the discussion of the merits of the case by the political agents of the two Governments cannot possibly result in any good, until the Supreme Court has finally decided the matter in dispute. For aught we know to the contrary, that decision may be such as the British Government desires.

When the judiciary having lawful cognizance of the subject matter has finally performed its functions, then, it seems to me, it will be time enough to discuss, in the political forum, any questions which may arise concerning reclamations and indemnities. Until then, I do not see the propriety of arguing the questions of law still pending in the courts.

If my opinion had been asked upon any specific question of law, growing out of the subject matter, I might, perhaps, have been able to answer more clearly, if not more satisfactorily. But as you desire only my views in general upon the communication of her Britannic Majesty's minister, it occurs to me that the above short note may suffice to meet the occasion.

I am, sir, very respectfully,

Your obedient servant,

EDWARD BATES.

Hon. WM. H. SEWARD,  
*Secretary of State.*

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Settlement of Accounts with Contractors.

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RIGHT OF SET-OFF IN THE SETTLEMENT OF ACCOUNTS  
OF CONTRACTORS

1. Where a contractor had entered into two contracts with the Navy Department and had fulfilled one of them, but failed to perform the other, it was held that the Department, in settling with the contractor, might lawfully deduct from the moneys due on the first or executed contract the amount of the forfeiture stipulated to be paid in the second contract in the event of a failure on the part of the contractor to perform it.
2. But where moneys were due to several joint contractors, it was held that the Navy Department could not deduct from those moneys the amount of the forfeiture due to the United States under an unfulfilled contract between the Government and one of the said joint contractors.

ATTORNEY GENERAL'S OFFICE,  
October 25, 1864.

SIR: I have the honor to acknowledge the receipt of your letter of the 4th instant, propounding for my consideration two questions of law, upon which I will now very briefly indicate my opinion.

The first case is this: A party has entered into two contracts with the United States. One of them has been fulfilled, and moneys are thereupon due from the Government to the contractor. The other contract—a contract within the provision of the act of March 3, 1843, (5 Stats., 617)—has not been fulfilled; and there is thereupon due to the United States from the contractor and his sureties, by virtue of this act, the amount of the forfeiture specified in the contract, and stipulated to be paid in case of failure to fulfill the contract. In that case the said statute provides, the party entering into such contract, and his sureties, shall be liable for the forfeiture *as liquidated damages*, to be sued for in the name of the United States in any court having jurisdiction thereof.

The question, then, is, whether your Department may lawfully deduct the amount of the forfeiture specified in, and due to the United States under, the second contract from the moneys admitted to be due to the contractor

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Settlement of Accounts with Contractors.

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under and by virtue of the first contract, which has been satisfactorily completed.

I am clearly of opinion that the Department has the right to make such deduction in settling with the contractor; and I so hold upon the principle that, in the event of the prosecution of the claim upon the first contract against the United States for the money due the contractor by reason of its fulfillment, the United States would have, according to well-settled doctrine, a perfect right to set off the full amount of the forfeiture stipulated in what I have called the second contract. Under the act of 1843, the stipulated forfeiture is, between the parties, the measure of the damages which the United States have sustained by reason of the non-performance of the contract. The failure of the contractor to supply the articles, or to perform the work, gives rise to a clear legal demand on the part of the United States for the entire amount of the sum stipulated to be paid in the event of failure to complete the contract; and this demand may lawfully be enforced, either by a suit against the defaulting party, or by deducting the amount due from the moneys for which the Government would otherwise be liable on the first contract.

The second case presents an element of fact which, I am of opinion, varies the law. In that case, I understand from your letter, moneys are due from the United States to the same contractor, *jointly with others*, under a contract which has been satisfactorily fulfilled; and the inquiry is, whether, from such moneys, the Department has lawful authority to deduct, as against the joint contractors, the amount of the forfeiture for which the same individual contractor has become liable upon and under the unfulfilled contract.

Regarding the doctrines of the law of set-off as furnishing a solution of this question, as I did of the first, I recognize the principle as well settled that a single defendant cannot set off a debt due to him from a part only of two or more plaintiffs in an action at law. The United States could not, therefore, defend a claim prosecuted by the joint



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Case of Steamboat Minnesota.

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contractors for moneys due them, by reason of the satisfactory completion of the contract to which they were parties, on the ground that one of the contracting parties is individually liable under an unfulfilled contract for the amount of the forfeiture specified and stipulated therein. The Department cannot assert, on behalf of the United States, a right which would not be sustainable at law.

I am of opinion, therefore, in reply to your second question, that the Department is not authorized to deduct the amount of the forfeiture from moneys due to the same contractor, jointly with others, under a contract which has been satisfactorily fulfilled.

I am, sir, very respectfully,

Your obedient servant,

EDWARD BATES.

Hon. GIDEON WELLES,

*Secretary of the Navy.*

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## CASE OF STEAMBOAT MINNESOTA.

1. The Secretary of the Treasury, and not the President, has power to remit the forfeiture of a vessel incurred by violation of the 2d section of the act of July 7, 1838, chap. 191, for the better security of the lives of passengers on steam vessels.
2. A judgment entered on a bond given in place of a vessel seized for a violation of that act, is incapable of being affected by any action of the President, who cannot invalidate such judgment, or, in any way, impair its force and effect against the stipulators.

ATTORNEY GENERAL'S OFFICE,

October 27, 1864.

SIR: I beg pardon for my delay in rendering you my opinion, as requested, upon the question which arises in the matter of the application for relief presented to you by one Ephraim Morrison, owner of the steamboat "Minnesota," a vessel proceeded against in the United States district court for the eastern district of Missouri, for a violation of the 2d section of the act of July 7, 1838. (5 Stats. at Large, 304.)

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Case of Steamboat Minnesota.

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This case has been before me on other occasions, and I am, therefore, somewhat familiar with its legal aspects.

I was, and am, clearly of opinion that the penalty or forfeiture incurred in this case, is one within the remitting power of the Secretary of the Treasury, under the 1st section of the act of March 3, 1797—and that he alone has authority, under the law, to mitigate the same. Of course, I do not undertake to say whether the case is or is not one proper for the exercise of this power by the Secretary; but that he has jurisdiction to grant the relief I entertain no doubt, if he should be of opinion that the penalty was incurred, in the language of the act of 1797, “without willful negligence, or any intention of fraud in the person or persons incurring the same.”

I had occasion to say, in an opinion given to your excellency, of date February 9, 1863, that the grant of power in the Constitution to the President to pardon “*offences against the United States*,” is, in its terms, and in its obvious sense, limited to *offences*, to crimes and misdemeanors against the United States, and does not embrace any case of forfeiture, loss, or condemnation, not imposed by law as a punishment for an offence. There is nothing in the Constitution which confers on the President the “power of remission” of penalties and forfeitures, unless it is found in the general grant of power to pardon offences, to which I have referred. In the present case, the party has not been proceeded against personally and criminally for any offence or crime against the United States. His vessel was seized and proceeded against, under the act of 1838, for a violation of the provisions of that statute. That was the form of remedy adopted by the United States, and the informers, under the authority of the statute, for the recovery of the penalty or forfeiture in question. The proceeding was *in rem*, and not against the *person* of the owner of the vessel. In that proceeding, under the principles just stated, the President has no constitutional or statutory authority to exercise any “power of remission.”

The present condition of the case is not as clearly stated

**McCracken's Case.**

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in the affidavit of Mr. Morrison as was perhaps desirable; but I infer, from what is said in the affidavit, that judgment has been entered against Mr. Morrison and his sureties upon the bond or stipulation which was entered, according to familiar practice, in place of the vessel.

The judgment, if the case has proceeded to that stage, is for the amount of the penalty imposed by the act—five hundred dollars; and, like any other judgment obtained in a court of law by the United States, against a citizen, is incapable of being affected by any action of the Executive. The President cannot invalidate it, or in any way impair its force and effect against the parties defendant.

I am of opinion, therefore, that the President has power neither to remit the penalty or forfeiture incurred by Mr. Morrison under the act of 1838, nor to afford him relief against the judgment which may have been entered upon the bond accepted by the district court of Missouri as a substitute for the vessel seized under the authority of the statute.

I am, sir, very respectfully,

Your obedient servant,

EDWARD BATES.

The PRESIDENT.

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**MCCRACKEN'S CASE.**

1. The President has no general constitutional or statutory power to remit judgments obtained against sureties in recognizances taken in criminal proceedings before the Courts of the United States.
2. The act of June 17, 1812, authorizes the President to remit the forfeiture of recognizances taken in such proceedings in the District of Columbia.
3. There is no statute under which the President may forgive, discharge, or reduce generally, debts due to the United States.

ATTORNEY GENERAL'S OFFICE,

November 21, 1864.

SIR: I have considered the petition, herewith returned, addressed to you by H. B. McCracken, of Jefferson county,

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McCracken's Case.

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Pennsylvania. It appears that Mr. McCracken became surety for the appearance, at the May sessions, 1864, of the United States district court for the western district of Pennsylvania, of one Charles Randall, indicted in that court for the offence of passing an altered United States Treasury note; that the said defendant, Randall, having failed to appear, according to the condition of the obligation, the recognizance executed by Mr. McCracken was forfeited, and that an action, in the usual form, was accordingly brought upon the recognizance in the said court, in which action judgment for \$3,000 was obtained by the United States against Mr. McCracken on the 15th of August, 1864.

Mr. McCracken appealing "to the Executive clemency," now prays "that upon the payment of costs, and the sum of thirty dollars for the benefit of the party or parties who have been defrauded, the said judgment may be remitted."

He represents to your excellency that "he is a young man, just starting in life, and cannot pay the said amount of three thousand dollars, for which judgment has been entered against him, without utter ruin to himself and his small family."

The question, I presume, which you desired me to answer when you referred this application to me, is, whether you have any constitutional or statutory power to grant the relief which is prayed?

I am of opinion that you have none. You have no constitutional power, because the authority conferred upon the President by the Constitution, "to grant reprieves and pardons for offences against the United States," does not, in my judgment, embrace or include within it power to discharge or reduce debts that are due to the United States in consequence of such a liability as was incurred by the party who presents this application. His liability arose and was incurred under a contract with the United States, by which he obliged himself to pay the sum for which judgment has been rendered against him, in the event of the indicted party failing to appear and take his trial on

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McCracken's Case.

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the day that has been named. The defendant failing to appear, Mr. McCracken became *prima facie* bound to pay the money to the United States. If Randall had been pardoned by the President, that fact might have constituted a good plea in bar of the action upon the recognizance; but neither that nor any other defence was interposed by the petitioner—and judgment, in due course of law, was rendered against him, not as a criminal, but as a *public debtor*. I am of opinion that the President, under the constitutional provision to which I have referred, has no power to remit this judgment.

Nor am I aware of any statute of the United States under which such a power is derivable. The President, in the cases of recognizances taken in criminal proceedings before the courts, judges, and justices of the District of Columbia, may grant remissions of the forfeitures of such recognizances, by the provision of the act of June 17, 1812; but I am not aware that any subsequent act has extended this power to cases beyond the District of Columbia. I am not acquainted, either, with any law of Congress, by authority of which the President may forgive, discharge, or reduce generally, debts that are due to the United States, or particular debts belonging to the same class as the present.

If such legislation exist, it is of very recent date, and my search has failed to discover it.

Being thus clearly of opinion that you have no power in the premises, I deem it unnecessary to make any remarks upon the merits of the present application.

I am, sir, very respectfully,

Your obedient servant,

EDWARD BATES.

The PRESIDENT.

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Case of Appleton Oaksmith.

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## CASE OF APPLETON OAKSMITH.

The warrant of a Judge of a Circuit Court of the United States will run throughout the United States.

ATTORNEY GENERAL'S OFFICE,

*December 10, 1864.*

- SIR : In your letter of this date you ask how the request contained in District Attorney Dana's letter to you of the 6th instant, relative to the arrest of Appleton Oaksmith, may be lawfully complied with?

I am of opinion that either judge of the circuit court of the United States for the district of Massachusetts has authority, under the act of September 24, 1789, sec. 33, (1 Stats., 91,) to issue a warrant for the arrest of Oaksmith; and that under such a warrant he may be lawfully arrested anywhere in the United States.

Attorney General Taney said that the power to arrest, conferred by the act of 1789, for any offence against the United States is given in general terms; and, so far as respects a judge or justice of the United States, it is not even confined to his district or circuit, but his warrant would run anywhere throughout the United States. (2 Opin., 564.)

There is another procedure, however, that may be resorted to under the statute with a view to the same end, which it may be well, perhaps, to mention in this connection. Any justice of the peace, or other local magistrate at New Orleans, as well as any United States commissioner, if there be one there, has jurisdiction under the act of 1789 to arrest Oaksmith and commit him to answer the demands of the court before whom he was convicted; and on such commitment being made, it will be the statutory duty of the United States district judge at New Orleans "seasonably to issue, and of the marshal of the same district to execute, a warrant for the removal of the offender" to Boston.

Inasmuch, however, as under the opinion of the late

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Case of Appleton Oaksmith.

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Chief Justice, the authority for Oaksmith's arrest at New Orleans, upon a warrant issued either by Judge Clifford or Judge Sprague, at Boston, is perfectly clear, I should suppose the Government would have no difficulty in adopting that course, and applying at once to one or the other of those judges for the necessary process.

I am, sir, very respectfully,

Your obedient servant,

J. HUBLEY ASHTON,  
*Acting Attorney General.*

Hon. WM. H. SEWARD,  
*Secretary of State.*

# OPINIONS

OF

HON. JAMES SPEED OF KENTUCKY,

APPOINTED DECEMBER 2, 1864.

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## ACCOUNTS OF UNITED STATES MARSHALS.

1. The Secretary of the Interior has no power, without authority of law, to reopen the accounts of a Marshal, which have been adjusted by the accounting officers of the Treasury.
2. The President has no power to direct the accounting officers to reopen such accounts after the Secretary of the Interior has refused an application by the Marshal for the reopening of them.
3. The Secretary of the Interior is invested by law with exclusive supervisory power over the accounts of United States Marshals, and his decision of questions connected with the settlement of such accounts is the law of such settlement for the Executive Department of the Government.

ATTORNEY GENERAL'S OFFICE,

*December 23, 1864.*

SIR: I have the honor to say that I have given very careful consideration to the questions upon which you have asked my opinion, at the instance of Hon. Thomas Corwin, attorney for W. Selden, Esq., late marshal of the District of Columbia, in connection with the papers referred to me with Mr. Corwin's communication.

The facts of his case, as they are disclosed by the papers referred to me, appear to be briefly these:

Mr. Selden was the marshal of the District of Columbia from the early part of 1858 to April 11, 1861. For as many as forty years before this gentleman went into office the marshal of the United States for this District, as it is stated, had been allowed by the accounting officers of the Treasury thirty-four cents per day, as his legal compensa-



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Accounts of United States Marshals.

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tion, for keeping and subsisting prisoners confined in the jail of the District of Columbia on criminal charges.

When Mr. Selden went into office the then Secretary of the Interior, Mr. Jacob Thompson, changed the rule and rate of compensation with respect to those particular services. He decided that by force of the act of Congress of March 3, 1807, (2 Stats., 430,) the old Maryland statute of December 30, 1779, (1 Kilty & Dorsey, 149,) governed the compensation in question, and that the marshal was entitled to receive, by authority of these laws, only the sum of *twenty-one* cents and a fraction per day for keeping and subsisting persons confined on criminal charges in the jail of the District of Columbia. Under this ruling of the Secretary of the Interior, Mr. Selden's accounts for the services specified were settled and adjusted at the Treasury during the whole period of time, I am informed, in which he held the office of marshal, and the moneys to which he was entitled, on the principle adopted by the Secretary of the Interior for the services specified, were received by him from the United States. In other words, Mr. Selden's accounts for the services in question, presented during his incumbency of the office of marshal, have been in the regular way settled, adjusted, and closed, on the basis of compensation mentioned, by the proper accounting officers of the Treasury. He retired from office in April, 1861, Mr. Lamon, the present marshal, having been appointed to succeed him.

In the month of October last Mr. Corwin, as attorney for Mr. Selden, addressed a letter to the Secretary of the Interior requesting him to direct a readjustment of the accounts of Mr. Selden for the maintenance of prisoners during the time he held the office, and to allow him the sum which might be ascertained to be due him between the allowance made to him of twenty-one cents per day, and that which his predecessors had received, viz, thirty-four cents per day for each prisoner.

The present Secretary of the Interior, as Mr. Corwin

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Accounts of United States Marshals.

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states, declines to take any action in the premises; in other words, refuses to make an order for the readjustment of Mr. Selden's accounts on the proposed basis.

Under these circumstances Mr. Corwin requested you to take my opinion on the two questions stated in his communication.

Before giving my opinion on these questions, I deem it proper to direct your attention to two preliminary points, which you will probably think deserve consideration in connection with this application.

The first is, whether the Secretary of the Interior was not right in his determination not to direct a readjustment of these closed accounts of Mr. Selden? I am clearly of opinion that he was, because, in my judgment, he possesses no power to comply with that gentleman's request. The act of March 3, 1845, sec. 4, (5 Stats., 764,) distinctly provides, that "no accounts which shall have been adjusted by the accounting officers of the Treasury shall be reopened without authority of law." The only cases in which adjusted accounts are capable of being reopened are those mentioned in the *proviso* to this section of the act of 1845, namely, "cases where special acts have passed, or shall pass, for the relief of individuals." The present case, of course, is not embraced by the exception to the rule of the act of 1845.\* I can imagine cases in which a question might well be made, as to when accounts may be said to have been adjusted, or as to what particular accounts, under certain circumstances, have or have not been adjusted within the meaning of the act; but in the present instance no such question can arise. Mr. Selden's accounts have been, in the strongest sense, "adjusted." They were settled and closed during the official term of a previous administration, under the direction of another head of the Depart-

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\* This act was repealed by the act of August 10, 1846, sec. 5, (9 Stats., 97,) but as the repealing provision occurs in the body of a civil appropriation act, it probably escaped the attention of the Attorney General, as it did that of Attorney General Bates. (10 Opin., 232, 255.)

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Accounts of United States Marshals.

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ment, charged by law with the superintendence of their settlement, and after a distinct and definite decision by the former Secretary of the very point now raised by the accountant against the claim he prefers. The opening of the accounts, adjusted under such circumstances, and after this lapse of time, would be not only against the express provision of the statute of 1845, but contrary to every principle of public policy, as has been very frequently held by my predecessors in this office. (See Mr. Grundy's opinion in McCalla's case, 3 Opin., 461; Mr. Gilpin's opinion in Otis's case, *Ibid*, 521; Mr. Butler's opinion, 2 Opin., 625.) The same authority, it is manifest, by which Mr. Selden's accounts might be now readjusted, would enable the Interior Department to open and readjust the accounts of all the gentlemen who have ever held the office so long as it has had a legal existence. The equity which Mr. Selden seems to invoke rests entirely on the fact that in March, 1863, the present Secretary of the Interior directed a readjustment of the present marshal's accounts, and directed him to be paid the difference between twenty-one cents, (the amount allowed by the preceding Secretary,) and thirty-six cents per day for each day. I give no opinion as to how far the present Secretary of the Interior had authority to take such action in respect to the accounts of Marshal Lamon, adjusted prior to that date, or whether they were or were not adjusted so as to be incapable of being opened without authority of law. The question to which I have addressed myself relates to Mr. Selden's accounts; and on that question I have, as you perceive, a very clear opinion.

The second proposition which I deem it proper to present to your attention is, that any mistake which may have been committed by the particular Secretary of the Interior, under whose direction the accounts were settled, or by the present Secretary, in refusing to consent to a readjustment of the account, cannot be corrected through the intervention of the President. The President, if he were ever so clearly persuaded that the Secretary of the Interior

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Accounts of United States Marshals.

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erred in the decision to which he arrived on Mr. Corwin's application, would have no authority in law to give the desired direction to the accounting officers of the Treasury. The Secretary of the Interior is invested by statute with exclusive supervisory power over the accounts of the marshals, clerks and other officers of all the courts of the United States; and where a statute requires a particular officer by name to perform a duty, not only is that officer bound to perform it, but no other officer can perform it without violation of the law. The recorded opinions of my predecessors are multitudinous, to the effect that all questions connected with the settlement and adjustment of accounts, under the general statutory regulations on that subject, are to be determined finally and conclusively, so far as the Executive branch of the Government is concerned, by the accounting officer appointed by law, and the heads of the respective Executive Departments; and that, if individuals conceive themselves aggrieved or injured by the decisions of those officers with respect to their accounts, their recourse must be to one or other of the remaining departments of the Government, the legislature or the courts. (See Mr. Wirt's opinion on Major Wheaton's case, 1 Opin., 624, and in Anderson's case, *Ibid*, 678; Mr. Taney's opinion in Grice's case, 2 Opin., 481, and in Hogan's case, *Ibid*, 344; and Mr. Crittenden's opinion on the general subject, 5 Opin., 630.)

In view of these considerations, I should have deemed it unnecessary to answer specifically the questions propounded to me, but inasmuch as you have required me to do so, I deem it my duty to give you such views as I entertain upon the questions, although I have in effect substantially answered them in the foregoing remarks.

The first question is as follows:

"Does the usage of the giving the marshal of this District thirty-four cents per day for subsisting prisoners, continued for a period of forty years, constitute a right enabling the marshal to demand the same compensation

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Accounts of United States Marshals.

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for the service until, by positive statute, that rate shall be changed?"

I answer this question by saying that I am not aware that it was ever supposed that there was no other and higher authority than usage of the Government for the payment to the marshal of this District of thirty-four cents per day for subsisting prisoners during the time the marshal received that amount from the Government. During that whole period of time it was the duty of the officers of the Government charged with the settlement of the marshal's accounts to determine by what *law* he should be paid for the service named. When Mr. Jacob Thompson became Secretary of the Interior, he was of opinion that the accounts of the marshal in question had been settled under a law not applicable to them, and he indicated the law which he supposed applied to them. He had jurisdiction to decide that question, and his decision was the law of the case for the time being. He was of opinion that after the act of July 9, 1846, (9 Stats., 35,) was passed to retrocede to the State of Virginia that part of the District of Columbia which had been ceded by that State to the United States, the marshal of this District was entitled to receive for subsisting prisoners confined in jail on criminal charges, the same compensation which, under the Maryland act of 1799, a sheriff of a county in that State received for the same service, namely, twenty-one cents and a fraction per day for each prisoner. He so decided on the ground that the act of Congress of March 3, 1807, governed the case, and that that statute adopted the Maryland act of 1779, as furnishing the rule of the marshal's compensation.

Before the act of retrocession the marshal had received, and was entitled to, thirty-four cents per day for subsisting prisoners from the county of Alexandria, because the law of Virginia, made applicable by the act of 1807, gave the amount to a sheriff of a county in Virginia for the same service. After the act of retrocession, it seems, he continued to receive the same amount for subsisting prisoners

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Accounts of United States Marshals.

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from the county of Washington, until Mr. Thompson became Secretary of the Interior, when the rate of compensation was changed, the belief of Mr. Thompson being that the law of Maryland, and not the law of Virginia, was, by virtue of the act of March 3, 1807, applicable to the case.

I am now prepared to give an answer to the first question, and I answer it in this form; if Mr. Thompson was of opinion that the marshal, for the reasons indicated, was only entitled to twenty-one cents, it was his duty so to decide, and if he so decided, as I understand he did, his opinion bound the accounting officers and the Executive Department. The fact alleged that for a very long period before Mr. Selden went into office the marshal's accounts were settled on the assumption that he was entitled to thirty-four cents per day for keeping prisoners charged with crime, did not give Mr. Selden any legal right to receive the same amount, and conferred no authority on the Secretary of the Interior to continue the allowance if he was of opinion that an erroneous rule of compensation had been applied by his predecessors in the settlement of the marshal's accounts.

The second question referred to me is in these words:

"Did the law or usage of the Government, or any statute, authorize the marshal of this District to demand and receive thirty-four cents per day for the subsistence of prisoners in jail from the 1st of March, 1858, up to the 11th of April, 1861, or during any portion of that period? If not, what amount he was entitled to receive during that period, or any part of it?"

I am of opinion, Mr. President, that the Executive Department of the Government must assume and hold that the marshal, during the period indicated, was entitled to receive just the amount which was allowed to him by the accounting officers of the Government, under the direction of the Secretary of the Interior, for the service referred to, and no more. The Secretary of the Interior was during that time the officer appointed by law to determine that question between the Executive Department and the mar-

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Accounts of United States Marshals.

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shal. The marshal's accounts during that period having been adjusted, and now being closed on the basis of the ruling of the Secretary, the matter, so far as the Executive Department of the Government is concerned, is *res adjudicata*.

If you, Mr. President, or I were ever so clearly of opinion that the act of February 26, 1853, (the Fee Bill, 10 Stats., 165,) was applicable to the marshal's accounts during the period indicated, that the laws prior to the act of 1853 had nothing to do with those accounts, and that Mr. Secretary Thompson was wrong in applying to them the rule of the Maryland statute, the accounts of Mr. Selden having been adjusted and closed under the application of that rule, there is now no power known to the Executive Department by which the supposed error is capable of correction.

I can probably give to the question a more direct answer that will be intelligible. I would say that if as Attorney General the question had been propounded to me, during the period from March 1, 1858, to April 11, 1861, by the head of the Interior Department, whether the act of February 26, 1853, (the Fee Bill,) or any act prior to that statute, provides the rules for the settlement of the accounts of the marshal of this District, I should probably have said that the marshal's accounts for fees and expenses were adjustable in accordance with the provisions of the act of February 26, 1853, (10 Stats., 165;) and that under those provisions he was entitled, "for the maintenance of prisoners confined in jail for any criminal offence," to receive a reasonable allowance, the rate of which would have been determinable by the proper accounting officers of the Treasury, according to such standard as under the circumstances might have seemed to them fair and just. But I would not have been competent to say whether, during that period or any part of it, twenty-one, or thirty-four, or thirty-six cents per day for each prisoner were a reasonable and proper amount to be paid to the marshal for the maintenance of each prisoner of the class mentioned in the act. That would have been a question of

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Records of Courts-martial.

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fact for the determination of the proper accounting officers under the direction of the Secretary of the Interior.

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

The PRESIDENT.

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RECORDS OF COURTS-MARTIAL.

1. Any person having an interest in the record of a naval court-martial on file in the Navy Department, is entitled to have an exemplified copy of it after the proceedings are consummated by the action of the proper revisory authority.
2. Public justice and private right require that the Secretary of the Navy and his subordinate officers should not withhold their testimony in regard to the contents of such a record when required to give it by the summons of a State court.

· ATTORNEY GENERAL'S OFFICE,

January 8, 1865.

SIR: I have the honor to state, as requested by you, my opinion upon the two questions propounded in your communication of the 29th ultimo.

The questions are as follows:

1. Whether the Secretary of the Navy, or any of his subordinates, is bound in law, on application of individuals, to furnish exemplified copies of records, or parts of records, of naval courts-martial on file in the Navy Department?

2. Whether the Secretary of the Navy, or any of his subordinates, is bound in law to answer to a commission of a State court directing the taking of his or their testimony as to the contents of records of naval courts-martial on file in the Navy Department?

It occurs to me that there can be no substantial difficulty in answering these inquiries, if the legal character of naval and other courts-martial and of their records is clearly apprehended.



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Records of Courts-martial.

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Courts-martial are judicial tribunals, constituted by statutory authority, and organized in pursuance of statutory regulation, for the administration of a great and an important department of jurisprudence, the law-military. They are, therefore, in the strictest sense courts of justice, having jurisdiction of a large and, in some respects, distinct community of our fellow-citizens, and taking judicial cognizance of the duties and obligations which the citizen assumes when he enters by enlistment or otherwise, into the military service of the country. The Supreme Court of the United States, speaking by Mr. Justice Wayne, in the case of *Dynes vs. Hoover*, (20 Howard, 82,) have given the following exposition of the jurisdiction of these courts, and of the character and effect of their judgments, in cases within their judicial cognizance:

“ Courts-martial derive their jurisdiction and are regulated with us by acts of Congress, in which the crimes that may be committed, the manner of charging the accused, and of trial, and the punishments which may be inflicted, are expressed in terms, or they may get jurisdiction by a fair deduction from the definition of the crime that it comprehends, and that the legislature meant to subject to punishment one of a minor degree of a kindred character, which has already been recognized to be such by the practice of courts-martial in the army and navy services of nations, and by those functionaries in different nations to whom has been confided a revising power over the sentences of courts-martial. \* \* \* With the sentences of courts-martial, which have been convened regularly, and have proceeded legally, and by which punishments are directed not forbidden by law, or which are according to the laws and customs of the sea, civil courts have nothing to do, nor are they in any way alterable by them. If it were otherwise, the civil courts would virtually administer the rules and articles of war, irrespective of those to whom that duty and obligation have been confided by the laws of the United States, and from whose decision no appeal, or

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Records of Courts-martial.

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jurisdiction of any kind, has been given to the civil magistrates or civil courts."

Courts-martial are, then, not only legally constituted courts of justice, but also, according to this high authority, courts of justice, whose judgments in cases fitted for their consideration and determination, are as final, conclusive, and authoritative as those of any judicial tribunal of the country. In England the military courts are as free from the control and dictation of the sovereign as the highest civil courts of the realm. The extent and limitation of the authority of the English sovereign with respect to courts-martial are distinctly set forth in the following passage from Mr. Tytler's standard Treatise on Military Law: "The king," says Mr. Tytler, "can no more interfere with the procedure of courts-martial in the execution of their duty than he can with that of any of the fixed courts of justice; nor even after the court-martial has pronounced its sentence is it in the power of the sovereign to add to or alter that sentence in any particular, unless a recommendation to that effect shall be therein contained. The king, in virtue of his prerogative, mercy, may entirely remit the punishment which the court has awarded, or by disapproving of the sentence, he may order the court to sit again, and to review their procedure and judgment; but he can no more decree any particular alteration of their sentence than he can alter the judgment of a civil court or the verdict of a jury." (Tytler's Essay on Military Law, 130.) In this country it has been held that the President has power not only to pardon persons convicted in military courts, but also to commute, provided he mitigate and add nothing in the commutation of the punishment. (*Ex parte Wells*, 18 How., 807.) After the sentence, however, has been approved and carried into effect, there is no revisory power by which it can be rescinded, annulled, or modified. It forever stands as the judgment of a court. (4 Opin., 514; 6 Opin., 514.) These considerations appear to me to be pertinent to the present inquiry; for, if they give a correct idea of the legal character of courts-martial,

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Records of Courts-martial.

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of their proceedings and jurisdiction, it would seem to be clear that when their judgments become finalities—when their proceedings have been consummated by the action of the competent revisory authority—the records of those proceedings should be regarded as standing upon the same footing, so far as the parties affected and the community at large are concerned, as the records of the ordinary tribunals of civil and criminal jurisdiction. The opinion has been expressed, by an American author of high repute on the law of evidence, that any limitation of the right to a copy of a judicial record or paper, when applied for by any person having an interest in it, would be repugnant to the genius of our institutions. (Greenleaf on Evidence, 524.) There are some cases of which the civil courts and the military courts have concurrent jurisdiction; but a party who has been tried, and either acquitted or convicted in a military court, cannot, I apprehend, be afterwards tried for the same offence in a civil court. Whether this be correct or not, (and I am aware that there exists a difference of opinion on the point,) certainly a former acquittal, or a former conviction, before any court-martial of competent jurisdiction, would be a good plea in bar of a prosecution before another court-martial for the same offence. In every case, however, in which such a plea were set up, the party would need and be entitled to receive a copy of the record on which he relied in making his defence, and it would be the duty of the officer charged with its custody to furnish the party, on his application, with a properly certified copy of the record. Again, the acts of Congress regulating naval courts-martial provide that “every person who shall commit willful perjury on examination on oath or affirmation before such court, shall and may be prosecuted by indictment in any court of justice in the United States.” (Act of July 17, 1862.) In such a prosecution a copy of the charges, the specifications, and the pleas upon which the trial before the court-martial was had, showing the issue tried by the court, and also of the recorded testimony adduced on the trial, could not, under

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Records of Courts-martial.

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many circumstances, be dispensed with either before a grand or a traverse jury. There are certain crimes, as is well known, which render the perpetrators of them infamous. A person convicted of, and sentenced for, such a crime is, in many of the States, rendered thereby wholly incompetent to testify in a court of justice, and in some of the States of the Union the credibility of a witness is seriously affected by the judgment of an infamous crime passed by a court of competent jurisdiction. Suppose that the record of a court-martial were required by a civil or a military court, in the case of such a witness, on the question of his competency or his credibility, I apprehend that the highest considerations of right and justice would enjoin upon the custodian of the desired record the duty of furnishing a copy of it for the inspection of any court who might signify a wish to receive it.

These and many other instances that could be enumerated, in which courts-martial records might be made available for the purposes of justice, clearly show that any rule by which the right to inspect and receive copies of the records of the proceedings of military tribunals would be limited and restricted, would operate to effect disastrously the administration of justice in cases in which the liberty, happiness, and life of the individual are often involved, and the safety of the State itself may be concerned.

The statutes regulating the course of procedure in military courts show that, in contemplation of Congress, these courts stand on the same footing as other judicial tribunals of the country. Their sittings, for example, are free to the attendance of the public, like those of other courts, and, as if to guard against improper secrecy in the case of courts-martial held in the army, the statute expressly provides that no proceedings or trials in such courts shall be carried on excepting between the hours of eight in the morning and three in the afternoon, except in cases which, in the opinion of the officer appointing the court-martial, require immediate example. The obligation assumed under oath by the members of a naval courts-martial, to

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Records of Courts-martial.

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keep secret the sentence of the court, is entirely removed by the very terms of the oath when that sentence has been approved by the proper authority; and even the vote or opinion of any particular member of the court may be divulged without a violation of duty, when the party is required to disclose it before a court of justice in due course of law. (See form of oath, act of July 17, 1862, 12 Stats., 600.)

Such and similar considerations induce me to hold that the written record of the proceedings before a naval court-martial becomes, when the proceedings are consummated by the action of the proper revisory authority, the record of an adjudicated case, tried and determined by a legally constituted court of justice, and that any limitation of the right to an exemplified copy of such a record on file in the Navy Department, when properly applied for by any person having an interest in it, would be contrary to law.

The foregoing remarks seem to me to contain a sufficient reply to the first question you have propounded to me.

With respect to the second point submitted, I am of opinion that the Secretary of the Navy, and any of his subordinates, having knowledge of the contents of naval courts-martial on file in the Navy Department, after the proceedings have been consummated by the action of the proper revisory authority, are bound in law to answer to a commission of a State court directing the taking of his or their testimony as to the contents of such records.

Upon principles of public policy there are some kinds of evidence which the law excludes or dispenses with. Secrets of state, for instance, cannot be given in evidence, and those who are possessed of such secrets are not required to make disclosure of them. The official transactions between the heads of departments of the Government and their subordinate officers are, in general, treated as "privileged communications." The President of the United States, the heads of the great departments of the Government, and the Governors of the several States, it has been decided, are not bound to produce papers or dis-

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Records of Courts-martial.

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close information communicated to them where, in their own judgment, the disclosure would, on public considerations, be inexpedient. These are familiar rules laid down by every author on the law of evidence.

But, as has been seen, I am of opinion that when the proceedings of naval and other courts-martial are at an end through the action of the competent revisory power, the contents of the records of such proceedings are not state secrets; nor are the records of the courts to be regarded as the minutes of official, confidential transactions, within the meaning of the rule which has been stated, between the Executive Department of the Government, or any of its officers, and the parties accused.

The head or an officer of a department may properly have the custody of the records, but such custody does not involve any right of exclusive control over the documents, nor does it imply any right to withhold the contents of them. Such records, it is plain, must be deposited and remain somewhere. They cannot stay in the possession of the courts, because they have no existence after the trials. They are then dissolved *sine die*. Their respective duties have been performed. The most appropriate place of custody is undoubtedly the archives of the Department charged with the administration of the branch of the military service in which the courts were respectively convened. With respect to the records of naval courts-martial on file in the Department, the Secretary of the Navy, or the officer of the Department in whose peculiar care they may be placed, stands relatively in substantially the same attitude as the clerk or the prothonotary of a civil court with respect to the records of cases instituted and determined in the court of which he is an officer.

I am clearly, therefore, of opinion, as I have said, that public justice and private right alike require that the Secretary of the Navy and his subordinate officers should not withhold their testimony with respect to the contents of

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Retirement of Naval Officers.

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the records in question, when required to give it by the summons of a State court.

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

The PRESIDENT.

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RETIREMENT OF NAVAL OFFICERS.

The act of June 25, 1864, (13 Stats., 183.) has the effect of removing from the retired list, officers of the navy who were retired in pursuance of the act of December 21, 1861, but who are not liable to be retired by the provision of the act of 1864.

ATTORNEY GENERAL'S OFFICE,

*January 6, 1865.*

SIR: I have the honor to acknowledge the receipt of your letter of the 24th ultimo, propounding to me a question touching the operation of the act of June 25, 1864, "to amend the act of the 21st December, 1861, entitled 'An act to further promote the efficiency of the navy.'" This statute provides "that the first section of the act of the 21st December, 1861, entitled 'An act to further promote the efficiency of the navy,' shall not be so construed as to retire any officer under the age of sixty-two years, and whose name shall not have been borne upon the navy register for a period of forty-five years after he had arrived at the age of sixteen years." (13 Stats., 183.)

The question you submit is, whether the effect of this statute is to remove from the retired list an officer claiming the benefit of the act of December 21, 1861?

The 1st section of the act of 1861, retired from service two classes of naval officers: firstly, those whose names may have been borne on the naval register forty-five years, and, secondly, those who had arrived at the age of sixty-two years. (12 Stats., 329.)

The question, then, which you submit is, whether the act of 1864 is to be regarded as simply establishing a rule

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 Claim of the Missionary Society.
 

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for the retirement of naval officers on account of age, for the future, or as nullifying the operation of the act of 1861 in the cases of those officers whose names, conformably to the provisions of that act, have been placed on the retired list.

I am of opinion that the intention of Congress was to repeal entirely, by the statute of 1864, the rule of the statute of 1861; and that the legal effect of the late statute is to remove from the retired list officers of the navy who were retired in pursuance of the act of 1861, but who are not liable to be retired by the terms of the act of 1864, as being over the age of sixty-two years, and as having had their names borne upon the navy register for a period of forty-five years after they had arrived respectively at the age of sixteen years.

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

Hon. GIDEON WELLES,  
*Secretary of the Navy.*

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CLAIM OF THE MISSIONARY SOCIETY OF THE METHODIST CHURCH.

1. Where under the treaty of May 10, 1854, between the Shawnee tribe of Indians and the United States, the Missionary Society of the Methodist Episcopal Church designated a person to whom the grant of land made in that treaty to the Society should be confirmed, and such person applied ten thousand dollars to the education of the Shawnees, it was held, that the person so designated was entitled to a patent, although the Society may have had an equity in the land prior to the treaty of 1854.
2. The United States can rightfully make no treaty which would deprive the person mentioned of his right to the land.

ATTORNEY GENERAL'S OFFICE,

May 12, 1865.

SIR: In the second article of the treaty of the 10th of May, 1854, between the Shawnee tribe of Indians and the United States, it was agreed that "of the lands lying east of the parallel line aforesaid, there shall first be set apart



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Claim of the Missionary Society.

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to the Missionary Society of the Methodist Episcopal Church South, to include the improvements of the Indian Mutual Labor School, three sections of land;" and by the sixth article it was agreed that this grant shall be subject to this condition: "The grant to the Missionary Society of the Methodist Episcopal Church South, at the Indian Mutual Labor School, shall be confirmed to said society, or to such person or persons as may be designated by it, by patent from the President of the United States, upon the allowance to Shawnees by said society of ten thousand dollars, to be applied to the education of their youth—which it has agreed to make."

From the facts as stated by the Secretary of the Interior, the Missionary Society of the Methodist Episcopal Church South designated one Thomas Johnson as the person to whom the land should be patented, and he applied ten thousand dollars to the education of the youth of the Shawnees.

Johnson claims that a patent issue to him.

The Missionary Society of the Methodist Episcopal Church objects, because, it says that it has an equity in the land prior to the treaty of 1854. Such an equity, if it in truth exists, may raise a claim against the Shawnee tribe, or the United States, or both, but cannot override Johnson's right to the land. His right is the superior, being under a treaty regularly made.

It is also suggested that the Shawnees desire, by another treaty, to abrogate this provision in the treaty of May, 1854. As Johnson has paid the ten thousand dollars, and been properly designated as the person to receive the title, the Shawnees and the United States cannot abrogate the treaty of 1854, so as rightfully to deprive Johnson of the land.

I am of opinion the patent should be issued to Johnson or his heirs.

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

The PRESIDENT.

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Claim of Commodore Wilkes.

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## CLAIM OF COMMODORE WILKES.

1. Commodore Wilkes, having without authority and in disobedience of the orders of the Navy Department usurped command of the United States Steamer Vanderbilt, cannot claim any share of the prizes captured by that vessel.
2. Commander Wyman cannot share in those prizes while acting, under orders of Commodore Wilkes, on board of that vessel.

ATTORNEY GENERAL'S OFFICE,  
*January 19, 1865.*

SIR: Your letter of August 10, 1864, addressed to my predecessor, has just been brought to my attention, and I have the honor to state that I think your view of the right of Commodore Wilkes to share in the prize taken by the Vanderbilt is correct. As Commodore Wilkes had without authority and in disobedience of the orders of the Department usurped the command of the Vanderbilt, he cannot claim any of the emoluments which belong to the lawful exercise of the office. The usurper of an office, public or private, cannot claim the salary, the emoluments, or the privileges attached thereto. If he could, there would be no difference between usurpers and legal officers obediently and faithfully discharging their duties.

The term "commanding officer," as used in the 3d section of the act of Congress approved July 17, 1862, (12 Stats., 605,) must be understood to mean an officer legally in command. In the construction of a prize act in England, the court held that the words "on board," meant only such as belonged to the vessel, and that being corporeally on board was not sufficient. (See *Wemys vs. Linzee*, Douglas, 327.)

In regard to the right of Commander R. H. Wyman, I have to express the opinion that he cannot share in the prize taken by the Vanderbilt, the commander having been on board with Commodore Wilkes, or under and in obedience to his orders. Though Commander Wyman was doing duty on the Vanderbilt, he was not doing duty under legal authority. The commander may not be cen-

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Distribution of Prize Money.

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surable for obedience to the order of the commodore. Obedience to an order is the duty of a subordinate officer, unless it be plainly an unlawful one. Prompt and cheerful obedience to the orders of a superior officer should be rendered by inferiors, and such orders when not palpably illegal will be a shield against damage to him or his reputation. But it does not follow that he will be entitled to share in the benefits which attach and come to those who, in the language of Lord Stowell, "come into office in the mode which the law prescribes."

As Commander Wyman was not lawfully doing duty on board, and as his name was not lawfully borne on the books of the vessel, he cannot share in the prize.

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

Hon. GIDEON WELLES,

*Secretary of the Navy.*

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DISTRIBUTION OF PRIZE MONEY.

Share of commander of capturing vessel.

ATTORNEY GENERAL'S OFFICE,

*January 28, 1864.*

SIR: I have the honor to say in reply to your letter of the 24th instant, that I am of opinion that where, in a case of maritime capture, several vessels are decreed to be entitled to share in the prize, and the proceeds of the subject of capture are distributable under and conformably to the provisions of the 10th section of the act of June 24, 1864, (18 Stats., 809,) the commander of each such ship is entitled to receive one-tenth part of the prize money awarded to the ship under his command, if, at the time of the capture, she was a vessel under the command of the commanding officer of a fleet or squadron, or a division,

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Authority of General Saxton.

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and three-twentieths if such ship was acting at the time of capture independently of such superior officer.

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

Hon. GIDEON WELLES,

*Secretary of the Navy.*

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AUTHORITY OF GENERAL SAXTON IN DEPARTMENT OF THE SOUTH.

Brigadier General Saxton had no power, under the order of the War Department of June 16, 1862, assigning him "to duty in the Department of the South," to erect at Port Royal, South Carolina, a judicial tribunal with authority to determine civil causes between citizens of the United States temporarily within that Department.

ATTORNEY GENERAL'S OFFICE,

*January 30, 1865.*

SIR: Your letter of the 6th inst. incloses to me, among other papers, a communication addressed to your Department by O. H. Browning, Esq., of the law firm of Ewing, Hill & Browning, of this city, containing an argument of great length and ability in favor of "the validity of certain judicial proceedings had at Port Royal, South Carolina, under the authority of General Saxton, as military governor," and you ask my opinion "as to the sufficiency of the argument" presented in Mr. Browning's communication in support of the validity of those proceedings.

Substantially the same question as the one you now present was submitted to and answered by my predecessor, Mr. Bates, who stated to your Department, in a letter dated September 12, 1864, that he had no knowledge of any law or authority under which the "judicial proceedings," to which reference is made, could rightfully be instituted or conducted. It appears, however, that Mr. Bates was not acquainted, at the time he prepared this opinion, with the character and scope of the orders given to General Saxton by the Department of War when he entered upon his com-

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Authority of General Saxton.

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mand in South Carolina, and under which he assumed to confer upon one "Judge A. D. Smith" jurisdiction to hear and determine the matter in controversy between George W. Smith and Alfred Lee. I am now furnished with a copy of the order of the War Department, dated June 16, 1862, assigning Brigadier General R. Saxton "to duty in the department of the South," and defining the powers conferred upon him and the authority which he was entitled to exercise in that department.

The question, therefore, now presented to me is the specific one, whether this order conferred upon General Saxton authority to establish judicial tribunals with jurisdiction and power within the limits of that department to hear and determine all pleas, actions and suits, civil and personal, as fully and as effectually as any court lawfully possessing and exercising such jurisdiction and power could or might do? This is the specific question that I am now to answer; for, if any other or greater authority than that expressed in the order referred to has been conferred by the War Department, or by the President, upon that officer, it has not been brought to my attention.

The question before me is not what power the constitutional commander-in-chief, either directly by his own warrant or indirectly by the act of the Department of War, was or is competent to confer upon this subordinate officer within the limits of the department of the South; but what power has been in fact conferred upon him by the President or by the Secretary of War.

Looking, then, at the only grant of power which has been adduced, the order of June 16, 1862, I am not able to see that the action of the judicature before whom the proceedings in question were had can derive any support or validity from the terms of that order. The subjects, the persons, and the things over which General Saxton is authorized to exercise control, and the amount and measure of authority intended to be conferred upon him in respect to such subjects, persons and things, are expressly named and indicated in the order referred to; and a very

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Authority of General Saxton.

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brief reference to the terms of that document will show that the Department from which it issued did not contemplate, so far as its instructions have been expressed in this order, that General Saxton would or should exercise any such sovereign authority as that involved in his action now under consideration. The order directed him "to take possession of all plantations heretofore occupied by rebels, and take charge of the inhabitants remaining thereon, within the department, or which the fortunes of war may hereafter bring into it, with authority to take such measures, make such rules and regulations for the cultivation of the land, and for the protection, employment, and government of the inhabitants, as circumstances may seem to require."

Whatever General Saxton may lawfully do under the foregoing authority with respect to the persons and things here mentioned and indicated, namely, "the plantations heretofore occupied by rebels," and "the inhabitants remaining on those plantations"—whether or not he may lawfully establish courts of justice within the department, and confer upon them jurisdiction to decide civil controversies arising between "the inhabitants remaining" on the "plantations heretofore occupied by rebels," under the general authority given him to make "rules and regulations for the protection and government" of such "inhabitants," it is very plain that he cannot, by virtue of that part of the order I have quoted, confer upon courts of his own creation civil jurisdiction over persons other than those named and described, or over subjects matter of controversies not arising between persons of the class not indicated in the order.

The order was framed in a spirit of wise provision for the benefit of the southern country, which our armies had or might overrun in the progress of the war, and of the persons who had been or might be, from time to time, by the successes of our arms, brought within the lines of our military occupation. The idea of the authority conferred upon General Saxton was to save private landed property

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Authority of General Saxton.

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in the South to the country, and to those who might ultimately become entitled to enjoy it, by making the property productive and valuable by continued cultivation; and, further, to employ to the best advantage, under suitable rules and regulations, the industry of those (principally persons who had formerly been slaves) who might be found connected with the plantations, with a view at once to the personal and social well being of those persons, and the general welfare of the country and nation.

Such were the objects (wise and beneficent objects they were) which the Government sought to accomplish in assigning this officer to duty in the department of the South. To carry out these objects, he was authorized to "exercise all sanitary and police powers" that might be necessary for the health and security of the persons under his charge, to imprison all disorderly, disobedient, or dangerous persons, or exclude them from the limits of his operations. For cases of need or destitution, he was directed to issue such portions of the army rations and such articles of clothing as might be suitable to the habits and wants of the persons supplied. And, finally, the Department expressed the expectation that by encouraging industry, skill in the cultivation of the necessaries of life, and general self-improvement, he would, as far as possible, promote the real well being of all persons under his supervision.

No authority could be more specific and special, both in respect to the subjects over which it was to be exercised, and the means to be employed in carrying out the objects of his appointment, than that conferred upon General Saxton when he was assigned to duty, under the order of June, 16, 1862, in the department of the South. His attention was expressly directed to be confined to two subjects, namely, the plantations heretofore occupied by rebels, and the inhabitants remaining thereon within the department.

With respect to the plantations in question, he was directed to make rules and regulations for their cultivation. With respect to the inhabitants remaining upon

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them, he was directed to provide rules and regulations for their protection, employment, and government.

We know historically the fact that the Government conferred the authority upon General Saxton chiefly with reference to the negro population of the South, and that the order under consideration has special reference to the employment, protection, and government of the former slaves of rebel landowners.

The order expressly conferred on him certain powers; but all of them were intended to be exercisable toward the accomplishment of the special objects of his mission. Such, for example, are the incidental powers of instituting sanitary and police regulations necessary for the health and security of the peculiar population placed under his supervision, the power of imprisoning disorderly and other dangerous persons, and of excluding them, if needs be, from the limits of his operations. These powers would have been exercisable by him without special authority, as incidental to the more general power, conferred by the Department, of protecting the population over whom he was placed by the Government.

There are certain other powers given which probably required, in order to their valid exercise, special enumeration, that would not have been implied from the general character and scope of the order in question. Such, for example, is the power of issuing rations and providing clothing to the destitute portions of the population, and of distributing medical and ordnance supplies among the people under his protection. Such, also, is the power, conferred expressly in the order, of acting upon the decisions of courts-martial called for the trial of persons not in military service, and of controlling the actions of the provost marshals, so far as the persons placed under his supervision might be concerned. Without this provision in the order, General Saxton would have had no authority to revise or act in any manner upon the decisions of courts-martial in the case of persons not in the military service. In other words, he would not have



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been competent to control the course even of military justice in criminal cases in the limits of the department of the South; and yet, in the face of this provision, which by its very form entirely excludes the idea of any such general judicial authority as is claimed, being intended to be conferred by the Government, it is pretended that this subordinate officer may lawfully, by force of the order in question, exercise that highest and most sovereign function of government—the function of administering, through agents of his own appointment, civil justice between all citizens of the United States whose persons or property may be found within the limits of the department of the South.

Again, the order reads: "It is expressly understood that, so far as the persons and purposes herein specified are concerned, your action will be independent of that of the other military authorities of the department, and in all other cases subordinate only to the major general commanding." I have indicated pretty clearly, as I believe, who are the persons and what are the purposes specified in the order. With respect to them he was directed to act independently of the other military officers in the department. In respect to all other matters, General Saxton was expressly subordinated to the major general commanding. Clearly, then, if any officer in the department was authorized to establish courts of justice to decide civil controversies between citizens of the United States temporarily in the limits of the department, that officer was not General Saxton. He was, as has been shown, but the special agent of the Government to execute certain specific measures touching the welfare of a peculiar class of people whom the fortunes of war had placed under our protection; and in that capacity he was entitled to exercise all powers expressly conferred, and all such powers as were reasonably to be implied from those expressly named. Any exercise of authority beyond the scope of such express and implied powers, without the sphere of the subjects with which he was expected and entitled to deal, was a

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mere act of usurpation, and therefore void. He was not in the position of a general of high rank, at the head of an invading army, in the midst of an enemy's country, distant from the seat of his government, who carries with him, in virtue of his office, a large measure of the authority which resides with the commander-in-chief, whether King or President, whose lawful powers, unless deprived by the supreme authority, have no limit any more than those of the government he represents—who, after he has conquered, has the right, because it is his duty, to govern, *pendente bello*, the people who are subjected to his control in any manner and through any agencies most convenient to himself, and most conducive to the interests of the government he represents.

General Saxton carried with him to the department of the South no other and greater power than that specially conferred upon him by the Government with reference to the accomplishment of the particular objects sought to be attained; and any argument in favor of his right to exercise the power in question, based upon supposed precedents in our history—what was done by American commanders in California and New Mexico, in times of hostility—utterly fails for want of any, even the slightest, analogy between the cases.

Let me say, in conclusion, that I discover in this delegation of authority nothing which, in my judgment, can be appealed to as affording the slightest foundation for the valid exercise of judicial power by any one under General Saxton's appointment, in cases cognizable by the civil courts known to the law of the land, over the citizens of the United States, not belonging to the class of persons described in the order, who may come or be found within the limits of the department of the South.

The power to appoint a person with such authority has certainly not been conferred in express terms, and it is not, in any respect, necessary to carry into execution any of the express powers enumerated in the order.

As it is not pretended that either of the parties to the

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Allotment Checks.

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proceedings instituted before "Judge A. D. Smith," under the authority of General Saxton, belonged to the class of persons, according to my view, as heretofore expressed, over whom that officer was placed in charge, and as the institution of those proceedings had not the remotest relation to the persons and purposes specified in the aforesaid order, as I interpret it, I am of opinion that the judgment attempted to be rendered in those proceedings is a nullity, and that it does not determine and cannot affect the rights of any person.

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

Hon. GIDEON WELLES,

*Secretary of the Navy.*

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## ALLOTMENT CHECKS

The United States is legally bound to pay the allotment checks or drafts issued by army paymasters under the act of December 24, 1861, in the hands of *bona fide* holders, without regard to the fact that such paymasters have not placed in the hands of the drawee sufficient funds to meet the drafts.

ATTORNEY GENERAL'S OFFICE,

*February 25, 1865.*

SIR: I have the honor to say, in acknowledging the receipt of your letter of the 13th instant, that I am very clearly of opinion that the United States is legally bound to pay the allotment checks or drafts issued by paymasters pursuant to the act of December 24, 1861, (12 Stats., 831,) in the hands of regular and *bona fide* holders of them, without regard to the circumstances that the paymasters who issued the said drafts may be in default to the Government, and that they have not placed in the hands of the drawee, the Assistant Treasurer of the United States at New York, sufficient funds to meet such drafts. The United States is legally as much bound to pay such drafts

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as it was bound originally to pay the soldiers, in favor of whose families or friends the drafts were issued, the full amount of the compensation which they would have been entitled to receive under their contracts of enlistment, and by law, if no such allotments of their pay had ever been made by the soldiers. Surely no one would pretend that, if a paymaster charged with the duty of paying a certain number of United States troops should embezzle the funds committed to him for that purpose before reaching the place where payment was to be made, the United States would thereby be discharged from the legal obligation to give the troops in question the full amount of their pay; and it can be pretended with as little reason that the default or neglect of a paymaster who may have issued allotment drafts under the act of 1861, in lieu of proportions of the soldiers' pay, in making provision at the proper time and place for the payment of such drafts, has the effect of throwing proper and *bona fide* holders of them upon the individual responsibility of the paymasters. I cannot understand how any one, with the act of 1861 before him, could entertain a doubt or question about the obligation and duty of the Government to make good all such drafts in the hands of *bona fide* holders. The statute, in express terms, authorizes our soldiers to make allotments of their pay to their families and friends, and just as expressly requires the several paymasters to give drafts payable in New York to the order of the persons to whom such allotments were made. The paymasters, in executing such drafts, place in effect the name of the United States upon them by authority of law. The credit of the United States, and not that of the agents of the Government, is pledged for the prompt payment of the drafts, and to repudiate them would be an act of black bad faith, which I am sure the Government could not be guilty of.

I am, therefore, of opinion that the proper and *bona fide* holders of such allotment drafts, in cases where the paymasters issuing the same have not provided sufficient funds in the hands of the drawee to meet them, are not com-

*Commission of Midshipmen as Ensigns.*

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pelled to rely upon the individual responsibility of the officers, but that in all cases the drafts should be made good from the Treasury of the United States through the Paymaster General or otherwise, as may be in accordance with your executive regulations.

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

Hon. EDWIN M. STANTON,

*Secretary of War.*

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COMMISSION OF MIDSHIPMEN AS ENSIGNS.

Under the act of July 16, 1862, section 11, students or midshipmen at the Naval Academy are not entitled to be commissioned ensigns until they have performed the term of duty on ship-board, prescribed by regulation of the Department upon the completion of their academic studies, and passed their final examination on practical navigation and seamanship

ATTORNEY GENERAL'S OFFICE,

March 8, 1865.

SIR: I have the honor to say in reply to your letter of the 10th ultimo, that I am of opinion that the regulation of the Department to which you refer, requiring the students or midshipmen at the Naval Academy, after the completion of their purely academical studies, to perform a term of duty on ship-board, in order to acquaint themselves with practical navigation and seamanship, and under which their relative and respective ranks in the grade of ensigns is in part determined by the result of an examination on the subjects indicated, after the completion of such term of duty on ship-board, is a perfectly valid regulation, as valid now as before July 16, 1862, and that students at the academy are not by law entitled to commissions as ensigns in the navy until after they have passed the final examination imposed and directed by that regulation of the Department.

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Commission of Midshipmen as Ensigns.

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The 11th section of the act of July 16, 1862, (12 Stats., 585,) provides as follows: "That the students at the Naval Academy shall be styled midshipmen, and until their final examination, when, if successful, they shall be commissioned ensigns, ranking according to merit."

The statute, it will be perceived, does not prescribe rules for the organization and government of the academy, nor designate the subjects and methods of study to be pursued by the students, nor regulate the details of the academic curriculum. When the law went into effect, there was in existence and operation a code of regulations framed and promulgated by the Secretary of the Navy, which made provision for the government and command of the institution, organized the professorial corps, established the academic board, prescribed the course of instruction in the various departments of study pursued at the institution, and regulated the different examinations, both intermediate and final, to which the students were subjected before completing their career in the academy and terminating their connection with the institution. The "final graduating examination," as determined and enforced by the regulations of the Department, was that examination to which the members of the graduating class were subjected after they had performed a term of duty on ship-board, with a view to their becoming practically proficient in the arts of seamanship, naval tactics, gunnery, and navigation. The numbers assigned to them respectively by the examining board as the result of the examination on the subjects indicated, when added to the numbers which had previously been assigned to them on the "graduating merit-roll" of the academy, determined their respective standing as passed midshipmen, the highest number taking precedence. This last examination upon the subjects to which the service of the students on board of ship was especially directed after the completion of the more purely academical studies, was the "final graduating examination" under the system devised by the Department.

Previously to that examination the students were re-

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garded, speaking academically, as undergraduates. After they had passed this examination they became graduates of the institution, and took rank in the navy conformably to their standing thus ascertained in the academy. Such was the system, so far as this matter is concerned, in operation at the naval school when the act of 1862 was passed.

The whole effect of the enactment in that part of the 11th section of the statute which I have quoted, is to entitle the students who may be successful at this final examination, or graduating examination, as it is treated in the regulations of the Department, to commissions as ensigns in the navy. The statute does not profess to change, nor can it be construed as changing, the system of study and discipline which the Secretary of the Navy had devised for the institution, and which was in full force and operation at the date of the statute. The statute simply determines the rank of the students in the navy during their career in the institution, and declares their rank in the service after graduation. It provides that they shall be styled midshipmen before and until their final graduating examination, and that they shall be ensigns after that examination. But when that examination shall take place, under what circumstances the students shall be subjected to it, and to what topics it shall be directed, the statute does not undertake to determine. It leaves all such details to be governed henceforth, as they had been previously governed, by the code of regulations prescribed by the Department. It must be assumed that Congress, when it made the law of 1862, had those regulations in mind. They were prescribed and enforced under its own authority, and so long as they were in operation, and remained unchanged by competent authority, they had, as Congress well knew, the efficiency of a statute. In legislating with precise reference to the "final graduating examination" at the academy, they gave, it may further be remarked, distinct legislative sanction to the regulation of the Department, by which that examination was appointed, and under

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Assignment of Quotas for the Draft.

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which it had been for many years enforced at the academy. If the question is asked, then, when an academic midshipman is entitled, under the act of 1862, to receive a commission, as ensign in the navy, no other answer can be given than this: After he shall have passed that examination which, by the regulation of the Department, is established as the "final graduating examination" at the academy, and that examination, I understand, is the one which takes place after the graduating students have performed their prescribed term of duty on ship-board.

I am clearly of opinion, therefore, that the objection taken to the validity, since the enactment of 1862, of the regulation in question is not sustainable; that the students or midshipmen at the Naval Academy are not in law entitled to promotion and to be commissioned ensigns in the navy immediately on concluding their academical studies; and that they are not entitled to receive commissions for that rank until after they have passed the final examination directed by the regulation of the Department, with respect to which the present question has arisen.

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

Hon. GIDEON WELLES,  
*Secretary of the Navy.*

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ASSIGNMENT OF QUOTAS FOR THE DRAFT.

The Provost Marshal General is not required to change the quotas in a draft ordered after the passage of the act of March 8, 1865, by reason of corrections in the enrollment made since the assignment of the quotas.

ATTORNEY GENERAL'S OFFICE.

*March 13, 1865.*

SIR: In your letter of the 11th of March, you ask me whether, under the act of Congress entitled "An act to amend the several acts heretofore passed to provide for



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Assignment of Quotas for the Draft.

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the enrolling and calling out the national forces, and for other purposes," approved March 3, 1865, the provost marshal general is required to change the present quotas in the pending draft by reason of corrections in the enrollment, made since their assignment?

In the 13th section of the act, it is enacted, "that where any revised enrollment in any congressional or draft district has been obtained or made, prior to any actual drawing of names from the enrollment lists, the quota of such district may be adjusted and apportioned to such revised enrollment, instead of being applied to or based upon the enrollment as it may have stood before the revision."

It will be seen that the language of this section is in the past tense, and properly so, although referring to future and existing enrollments. An enrollment must ever precede any action under the section. It was, therefore, right to speak of the enrollment as a past fact, as something that had been done. Regarding the section by itself, and as unaffected by other clauses in the statute, it applies as well to any future as to an existing enrollment.

But at the time of the enactment there was an enrollment and pending draft under a call for additional troops, and this appears from the proviso to the 15th and 27th sections. It is provided in the 15th section that the rule of credits fixed therein shall not apply to the pending call; and in the 27th section, it is "provided, that nothing herein contained shall operate to postpone the pending draft, or interfere with the quotas assigned therefor."

Neither of these provisos can be regarded as repugnant to the 13th section. They do nothing more than prevent a construction of the act that would change the rule of credits as to the pending draft, or that would postpone it, or that would interfere with quotas assigned therefor. Indeed Congress has by implication declared that the quotas assigned for the present or pending draft shall not be interfered with. This could have been done in the enacting parts of the statute, but it may be as well and aptly done by proviso.

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Substitutes in the Draft.

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Now if the corrections provided for in the 13th section are made to apply to the present draft, the quota as assigned therefor will be interfered with. This is what Congress has said shall not be done. After the pending draft, the provisos will have performed their office, and all future drafts must be made subject to the rules prescribed in the act.

I am therefore of opinion that the provost marshal general is not required to change the present quotas in the pending draft by reason of corrections in the enrollment made since their assignment.

I am, sir, very respectfully,  
Your obedient servant,

JAMES SPEED.

Hon. E. M. STANTON,  
*Secretary of War.*

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SUBSTITUTES IN THE DRAFT.

1. The 23d section of the act of March 3, 1865, chap. 79, does not supersede the 4th section of the act of February 24, 1864, chap. 13.
2. The "recruits" whom enrolled persons may cause to be mustered into service under the 23d section of the act of March 3, 1865, are to be considered as other volunteers obtained at the expense of the United States.

ATTORNEY GENERAL'S OFFICE,

*March 14, 1865.*

SIR: The first question propounded in your letter of the 10th instant is, whether the 23d section of the act of March 3, 1865, "supersedes" the 4th section of the act of February 24, 1864?

The 4th section of the act of February 24, 1864, enables any enrolled person, before a draft, to furnish "an acceptable substitute, who is not liable to draft, nor at the time in the military or naval service of the United States," and provides that the person so furnishing such substitute "shall be exempt from draft during the time for which

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such substitute shall not be liable to draft, not exceeding the time for which such substitute shall have been accepted."

Under this enactment, any person enrolled and liable to draft, may obtain exemption from the draft during the whole period of time for which he shall procure a substitute to be enlisted, provided the substitute shall be so long not liable to draft. It is not a mere credit for a particular draft which such person obtains by furnishing a substitute before the anticipated draft, but it is an absolute exemption from liability to be drawn at any and every draft which may occur during the entire term for which his substitute has been accepted by the Government, provided the substitute be so long not liable to draft. If, for example, his substitute is accepted as a three years volunteer, and remain so long not liable to draft, the principal, by the provision of the law of 1864 just referred to, is insured against the risk of being drafted during the whole period for which his substitute enlisted, no matter how many drafts may occur between the enlistment of the substitute and the expiration of his term of service. But the Government, under this provision, is to be at no expense in consequence of the authorized substitution of one individual for another in the draft. The party who desires to avail himself of the benefit of the privilege conferred by the law, is properly and justly required to compensate the substitute.

Such being the provision of the law of 1864, on the subject of "substitutes" furnished in anticipation of a draft, the law of March 3, 1865, provides (in its 23d section) as follows: "That any person or persons enrolled in any sub-district may, after notice of a draft and before the same shall have taken place, cause to be mustered into the service of the United States, such number of recruits not subject to draft as they may deem expedient, which recruits shall stand to the credit of the persons thus causing them to be mustered in, and shall be taken as substitutes for such persons or so many of them as may be drafted, to the extent of the number of such recruits, and in the order

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designated by the principals at the time such recruits are thus as aforesaid mustered in."

It is clear that this enactment provides for quite another case than that contemplated by the provision adverted to in the statute of 1864, and confers upon an enrolled person a privilege entirely distinct from that given to him by that statute, of which he may avail himself at his option, in preference to the privilege conferred by the act of 1864. Under the provision of the 23d section of the act of March 3, 1865, he may, in advance of a draft, "cause to be mustered into the service" a "recruit not subject to draft," which "recruit" will "stand to the credit" of the enrolled person causing him to be mustered in, in the event of the principal being drafted, and will be taken on the happening of that contingency as a substitute for such principal. But the "credit" shall avail him only for the particular draft in advance, and in anticipation of which he may have secured the "recruit."

There is no provision in the act of 1865 that the person furnishing a "recruit" under the 23d section shall be "exempt from draft" during the time for which the recruit may have been accepted and enlisted. But the only benefit which a person so furnishing a recruit derives under the act of 1865, is the securing, in the event of his being drafted, a "credit" on the particular draft in anticipation of which the recruit may have been furnished. The "recruit" may be mustered into service for three years, and yet as a substitute he can only avail the person who caused him to be mustered in for and with respect to the one draft before and in anticipation of which he was obtained. The liability of the principal to be drafted at any other drafts, occurring after the mustering in of the "recruit" and during the term of his service, is not at all affected. There is manifestly, therefore, no conflict between the respective sections of the acts of 1864 and 1865, to which you have called my attention. One does not impinge upon or even cross the path of the other. They give different and distinct rights and privileges to the citizen liable to draft.

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He has the alternative course to pursue before any draft, either to buy a "substitute" and secure him to be mustered in, and thus obtain exemption from the draft during the entire term of the enlistment of the substitute, if the latter be so long not liable to draft, or obtain credit for such recruit in case he should be drafted, subjecting himself, however, to the liability of being compelled to repeat the operation at every succeeding draft that may be ordered by the President.

Chiefly, I suppose, the design of the provision of the act of 1865 was to offer inducement, and present a stimulus, to numbers or associations of individuals in any sub-district, before the liability of any of them became fixed by a draft, to obtain volunteer recruits for the army. Congress, in this law, offers such associations a premium to use their exertions to fill up the armies. It says to the residents of the multitudinous counties, townships, wards and precincts throughout the country, "organize yourselves into recruiting societies, induce volunteers to enlist into the service before the draft, pay them such amounts of bounty as you may be able to raise by your contribution to the recruiting funds of your several districts, and when they have been enlisted into the service, the volunteers you may have raised will stand to the credit of as many of you as may happen to be drafted to the extent of the number of the recruits in the order designated at the time the recruits are mustered in."

Such is the declaration and promise of the new law. Its policy is to encourage recruiting, not the procurement of substitutes; to induce the public to organize associations for the advancement of volunteering, rather than the purchase of substitutes.

In enacting the new law, and inaugurating this new policy, Congress, however, has not taken away the right of the enrolled person, before the draft, to furnish a substitute, with the qualification before stated, and thus secure his exemption from draft during the time for which his substitute shall have been accepted. He still has it in his

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power to exercise that right in preference to the right conferred by the 23d section of the act of March 3, 1865, of obtaining a recruit previous to each draft as it may occur, and securing thereby a "credit" in the event of his being drafted.

I am of opinion, therefore, that the 23d section of the act of March 3, 1865, does not supersede the 4th section of the act of February 24, 1864.

The second question which you have referred to me is, whether the "recruits" which are "to be taken as substitutes," are to be considered and borne upon the muster rolls and records of the provost marshal general's office as other volunteer recruits which are obtained at the expense of the United States, or as substitutes which are furnished at the cost of the principals?

I am of opinion that the "recruits," whom persons enrolled in any sub-district "may cause to be mustered into the service of the United States," in pursuance of the 23d section of the act of March 3, 1865, are to be considered and treated as other volunteers who are obtained at the expense of the United States. It will be observed from the analysis of the law contained in the foregoing remarks, that the idea involved in the law of 1864 is substitution, while the idea of the law of 1865 is crediting. The section of the act of 1865 under consideration does not speak of the "recruits" in question as "substitutes," but declares that they "shall be taken as substitutes" for the persons who cause them to be mustered in. They are not substitutes, but only of the nature of substitutes. Their primary and essential character under the law is that of "credits" for their procurers or principals, and this description is the first description given of them in the section in question, for after saying "which recruits shall stand to the credit of the persons thus causing them to be mustered in," the section proceeds, "and shall be taken as substitutes for such persons, or so many of them as may be drafted, to the extent of the number of such recruits." A critical study of the words of the statute thus develops the fundamental idea

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which I have supposed from other indications was intended to be embodied in the law. The "recruits" who are to "stand to the credit" of the enrolled persons causing them to be mustered in before the occurrence of a draft, I am of opinion then, are to be considered as other volunteer recruits which are obtained at the expense of the United States, and not as substitutes, in the ordinary sense of that term, which are furnished at the cost of the principals.

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

Hon. E. M. STANTON,  
*Secretary of War.*

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CREDIT OF RECRUITS IN THE DRAFT.

Rules for determining the "actual residence" of recruits with reference to the execution of the 14th section of the act of March 8, 1865, to provide for enrolling and calling out the national forces.

ATTORNEY GENERAL'S OFFICE,

March 15, 1865.

SIR: Upon the 14th section of the act, entitled "An act to amend the several acts heretofore passed to provide for the enrolling and calling out of the national forces," which provides as follows: "That hereafter all persons mustered into military or naval service, whether as volunteers, substitutes, representatives, or otherwise, shall be credited to the State, ward, township, precinct, or other enrollment sub-district where such persons belong by actual residence, (if such persons have an actual residence in the United States,) and where such persons were or shall be enrolled, (if liable to enrollment,) and it is hereby made the duty of the provost marshal general to make such rules and give such instructions to the several provost marshals, boards of enrollment, and mustering officers, as shall be necessary for the faithful enforcement of the provisions of the section, to the end that fair and just credit shall be given to every

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section of the country: *Provided*, That in any call for troops hereafter, no county, town, township, ward, or election district, shall have credit except for men actually furnished on said call, or the preceding call, by said county, town, township, ward, precinct, or election district, and mustered into the military or naval service on the quota thereof."

In your letter of the 12th of March, you ask my opinion on the following points:

First. As to the meaning of the words "actual residence," as employed in the above section, and the proper mode according to law of determining the actual residence of men offering for recruits.

Second. When the "actual residence" of the recruit is in one sub-district, and he is enrolled in a different sub-district, where shall the credit be given?

Third. In cases where the recruit has no legal domicil, or actual residence in any enrollment sub-district, shall he be credited to the sub-district or district where he is enrolled, or shall he be allowed to select his locality?

I. The first of the above questions may be divided into two parts: first, as to the meaning of the words "actual residence;" and, secondly, as to the proper mode of ascertaining the "actual residence."

It is very difficult to give a test by which the question of actual residence may be determined in each particular case. A few general rules may be given, however, by which a vast majority of the cases can be readily determined.

1. Every person must be presumed to have an actual residence somewhere.

2. A man can have but one actual residence at one and the same time.

3. A residence once acquired remains until another is acquired.

4. The place of a man's origin is that of his actual residence until he acquires another.

5. Minors have their actual residence with their parents, or guardians, or, if apprentices, with their masters.



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Credits of Recruits in the Draft.

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6. Adults reside at the places of their dwelling. A man's dwelling is in contradistinction to his place of business, trade, or occupation. He dwells at the place he habitually sleeps or passes his nights.

7. In every country there is more or less population floating like drift. They never expect to remain long at any place, and go thence whenever and wherever the hope of employment may invite or fancy dictate. Such persons have their actual residence in the community in which they may dwell at the time of the enrollment.

As to the mode of ascertaining the actual residence of a recruit, the statute gives authority to the provost marshal general to make such rules and give such instructions as will enable the boards of enrollment and mustering officers to ascertain the facts and assign the credit according to the truth of the case. In most cases the affidavit of the enrolled man would determine the matter. But, as it is a question in which the sub-districts have an interest as well as the recruits, and as recruits may for bounties or bribes declare contrary to the fact their places of residence, the rules to be prescribed should admit of counter proof.

II. My opinion is, that where the actual residence is in one sub-district and the man is enrolled in a different sub-district, the credit should be given to the actual district of his residence.

The whole object and purpose of this section is to fix a rule by which places are to receive credits for enrolled men. It gives a rule of credit to the State, and to the ward, township, precinct, or other enrollment sub-district for enrolled men only. It is silent as to how or where recruits not enrolled, or liable to be enrolled, are to be credited. In order that the credit may be made according to the rule in this section prescribed, the man must not only have an actual residence, but he must be enrolled. The words of the section, "and where such persons were or shall be enrolled," relate to the fact of enrollment rather than the place of enrollment. These words are introduced to announce the fact of enrollment, and not to affect or

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Requisitions of Secretary of the Interior.

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control the question as to the place of credit. This is manifest from the context, and especially from the words in parenthesis, just following those above quoted, to wit, ("if liable to enrollment.")

III. Nothing else appearing, it must be taken for granted that the actual residence is the place of enrollment, and credit given accordingly. If, however, it should be made to appear that, though enrolled in a particular sub-district, the person has no actual residence, then this statute furnishes no rule by which the credit can be given. In such case the credit must be given under the law or according to the rule in force before and independently of this act.

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

Hon. EDWIN M. STANTON,  
*Secretary of War.*

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REQUISITIONS OF SECRETARY OF THE INTERIOR ON  
INDIAN APPROPRIATIONS.

By the terms of the Act of March 3, 1865, "making appropriations for the current and contingent expenses of the Indian Department," &c., for the year ending June 30, 1866, the appropriations therein made for the relief and support of certain refugee Indians, and for payment of interest on non-paying stock held in trust for Indian tribes, can be rightfully drawn upon by the Secretary of the Interior before the commencement of the fiscal year ending June 30, 1866.

ATTORNEY GENERAL'S OFFICE,

March 22, 1865.

SIR: On the 3d of March, 1865, the President of the United States approved "An act making appropriations for the current and contingent expenses of the Indian department, and for fulfilling treaty stipulations with various Indian tribes, for the year ending thirtieth June, eighteen hundred and sixty-six, and for other purposes." This

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Requisitions of Secretary of the Interior.

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statute, which thus became a law on the 3d day of March, 1865, in its 6th section, authorizes and directs the Secretary of the Treasury to pay to the Secretary of the Interior the sum of two hundred and fifty thousand dollars for the relief and support of certain refugee Indians who have been reduced to want on account of their friendship to the Government; and also, in its 1st section, appropriates the sum of \$446,233 50 "for payment of interest on one million six hundred and ninety thousand three hundred dollars, non-paying stock held by the Secretary of the Interior in trust for various Indian tribes, up to and including the interest payable July 1, 1866."

The Secretary of the Interior having drawn a requisition upon your Department for the payment at once of a portion of these respective funds, the question you submit for my consideration and opinion is, whether or not the respective appropriations on which you are requested to cause a warrant to be issued "can rightfully be drawn upon before the commencement of the next fiscal year?" This question is, in effect, whether the respective sums of money appropriated by Congress for the purpose indicated in those provisions of the act of March 3, 1865, to which I have referred, are presently payable to the Secretary of the Interior, the head of the Department charged with the administrative control and disposition of the money, or are not payable to that officer, by the terms of the act of Congress, until the beginning of the next fiscal year. If, by the terms of the statute, they are presently payable to the Secretary of the Interior, then they may "rightfully be drawn upon" now, and the warrant requested should be issued; but if Congress in the statute has expressed its will that the moneys in question are not payable and should not be paid out of the Treasury until the 1st of July next, then the Secretary of the Interior has no authority now to control them, and you have no power to draw the required warrant until that time.

This question of the intention of Congress—what the Legislature has declared and ordained in respect to the

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Requisitions of Secretary of the Interior.

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point of time at which the moneys in question are payable from the Treasury—must be solved by an examination and consideration exclusively of the words it has employed, the language of the particular provisions making the appropriations, as well as, so far as they are pertinent, of the provisions which accompany them in the statute. What, then, looking at the words of the act—of the whole act in the way I have indicated—has Congress ordained in respect to the sum of \$250,000 to be applied for the relief and support of certain destitute loyal and refugee Indians, as well as in respect to the sum of \$446,433 50 to be applied in payment of interest on the non-paying stock held in trust by the Secretary of the Interior for various Indian tribes. This statute, which became a law by the President's approval on the 3d of March, 1865, is an act making appropriations for certain expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes for the year ending June 30, 1866, and for other purposes. One of the purposes sought to be accomplished by the statute is the relief and support of individual members of certain Indian tribes who have been driven from their homes and reduced to want on account of their friendship to the Government, and the effect of the 6th section is to provide how, the ways and means by which, that purpose is to be in part accomplished. Its provision is, that the Secretary of the Treasury shall, in lieu of the bonds for the sum of \$250,000 appropriated for the use of the Choctaw Indians by the act of March 2, 1861, pay to the Secretary of the Interior \$250,000 for the relief and support of individual members of Cherokee, Creek, Choctaw, Chickasaw, Seminole, Wachita, and other affiliated tribes of Indians who have been driven from their homes and reduced to want on account of their friendship to the Government, as contemplated by the provisions of the act of July 5, 1862. By means, then, of this sum of money, which Congress directs the Secretary of the Treasury to pay to the Secretary of the Interior, relief and support are to be afforded to the destitute loyal refugees belonging to

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Requisitions of Secretary of the Interior.

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the tribes of Indians named, as contemplated by the provisions of the act of July 5, 1862.

Now I perceive, let me say, not a word in all this provision from which it can be inferred that Congress intended that the Secretary of the Treasury should not make the payment to the Secretary of the Interior that is enjoined and directed until the commencement of the next fiscal year. "The Secretary of the Treasury," says the law, "is hereby authorized and directed to pay to the Secretary of the Interior two hundred and fifty thousand dollars." What word is there in this provision that shows that the direction is not to take effect, nor to be binding on the Secretary of the Treasury, until three months and more hence? The direction to the Secretary of the Treasury is to do the thing required by the statute at once upon the act becoming a law. It became a law on the 3d of March, 1865. Within a reasonable time, then, after the 3d of March, 1865, it became the duty of the Secretary of the Treasury to make the payment authorized and directed by the statute. The Secretary of the Interior asks that you now comply with the directions of the statute. I think, therefore, that he has authority to make the request, and that it is your duty to grant it.

If there were nothing, then, on the face of the 6th section but the words to which I have referred, I should be of opinion that the duty enjoined upon you by the imperative terms of the act is presently performable, and that its performance should not be postponed until any future time, unless, indeed, I could find some other controlling provision in the law which indicated a contrary intention on the part of Congress. But, besides the words I have quoted, there are spread on the face of the 6th section references to antecedent legislation which show clearly and distinctly that Congress in this enactment was looking to the past rather than to the future, and legislated in regard to subjects-matter which had already been and were then of legislative and administrative cognizance and action. I allude to the reference, on the face of the 6th section, to

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Requisitions of Secretary of the Interior.

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the act of March 2, 1861, and to the act of July 5, 1862, which I cannot now pause to analyze and consider. They more or less peculiarly concern another question which it is not for you nor, now, for me to decide—the question, namely, of the proper disposition of the fund after the Secretary of the Interior shall obtain control over it. That question is one for the exclusive determination of the Secretary of the Interior, and is not presented, as it could not be by you, for my consideration. I now refer, in this cursory way, to what is mentioned in the section concerning the act of 1861 and 1862, because the mention of them gives countenance and aid to the interpretation of the section, obtained from the simple enacting words in which the intention of Congress has been clothed.

But it may be supposed that the fact that Congress has seen fit to introduce the provision contained in the 6th section of the act into “An act making appropriations for the current and contingent expenses of the Indian department, and for fulfilling treaty stipulations with various Indian tribes, for the year ending June 30, 1866,” supports the position that the money directed to be paid by your Department to the Secretary of the Interior is not liable to be drawn from the Treasury until the beginning of the fiscal year for which the general appropriations, contained in the act, are made. Whatever effect may be given to the general provisions of the statute making appropriations of money for the ordinary current and contingent expenses of the Indian department, and to meet the periodically recurring obligations of treaty stipulations with the Indians—whether under those provisions the moneys appropriated are contemplated by the act as liable to be drawn from the Treasury until the fiscal year begins, or not, and on this question I give no opinion—I am clear in the opinion that the general scope and nature of the act, whatever may be their effect, have and can have in law no such operation as is attributed to them upon the provisions of the section under consideration. The act makes appropriations as well for the general purposes indicated

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Requisitions of Secretary of the Interior.

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in the preamble of the statute, "for other purposes." It positively directs in the 6th section the payment in question to be made—a payment for a special and peculiar object; and I think the section under consideration must be construed, as if it stood on the statute book, together with its accompanying sections, the 5th and 7th, in the form of a separate act, unaffected by the foregoing sections described in the first words of the preamble. So considering it, I suppose, no one can doubt what is its meaning, and what effect is to be attributed to it.

The Secretary of the Interior also requests you to cause a warrant to be issued for a portion of the amount appropriated by Congress for "payment of interest on one million six hundred and ninety thousand three hundred dollars, non-paying stock held by the Secretary of the Interior in trust for various Indian tribes."

I am of opinion that the amount of this appropriation may be taken from the Treasury before the beginning of the fiscal year on the requisition of the Secretary of the Interior. Some of the observations I have made, in commenting upon the 6th section of the act, are applicable to the provisions of the law by authority of which the Secretary of the Interior claims that a portion of the money embraced in his requisition may now be issued from the Treasury. I perceive nothing in the statute which postpones the vesting in the Secretary of the Interior of the power conferred by the statute to draw upon the appropriation in question until the beginning of the next fiscal year. Congress had absolute power to indicate and ordain the time when the money, which it intended should be applied to the payment of interest on non-paying Indian trust stocks, should come under the control of the head of the Interior Department; and, if it had intended that the money so to be appropriated should remain in the Treasury and beyond the control of that Department until the next fiscal year began, it would have been extremely easy for the Legislature to have given unequivocal expression of its will to that effect. Finding in the act no evidence

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Credits on the Draft.

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of such a legislative intention, I am constrained to hold, by force of a general and fundamental principle, that the enactment takes effect at and from its date upon the moneys in the Treasury of the United States, to the extent of the amount appropriated for the purpose indicated, and that the moneys may to that extent lawfully be drawn upon from the date of the statute by the Secretary of the Interior.

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

Hon. HUGH McCULLOCH,  
*Secretary of the Treasury*

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CREDITS ON THE DRAFT UNDER PRESIDENT'S CALL FOR  
TROOPS OF DECEMBER 19, 1864.

The 14th section of the Act of March 3, 1865, amendatory of the several acts to provide for enrolling and calling out the national forces, is applicable to the call for troops made by the President on December 19, 1864.

ATTORNEY GENERAL'S OFFICE,

March 24, 1865.

SIR: In your letter of the 22d instant you ask whether the 14th section of the act approved March 3, 1865, entitled "An act to amend the several acts heretofore passed to provide for the enrolling and calling out the national forces, and for other purposes," is applicable to the call for troops made by the President, December 19, 1864. The section is as follows:

"That hereafter all persons mustered into the military or naval service, whether as volunteers, substitutes, representatives or otherwise, shall be credited to the State and to the ward, township, precinct, or other enrollment sub-district, where such persons belong by actual residence, (if such persons have an actual residence in the United States,) and where such persons were or shall be enrolled,

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(if liable to enrollment); and it is hereby made the duty of the provost marshal general to make such rules and give such instructions to the several provost marshals, boards of enrollment, and mustering officers, as shall be necessary for the faithful enforcement of the provisions of this section, to the end that fair and just credit shall be given to every section of the country. *Provided:* That in any call for troops hereafter no county, town, township, ward, precinct, or election district, shall have credit except for men actually furnished on said call, or the preceding call, by said county, town, township, ward, precinct, or election district, and mustered into the military or naval service on the quota thereof."

The 29th section makes the act take effect from and after its passage.

The 14th section furnishes the rule by which men, when mustered into the military or naval service, are to be credited to the various localities from which they may come.

The 16th section furnishes the rule by which credits are to be given when computing for the quotas of the various draft districts. But the 15th section has a proviso which expressly prohibits the application of the rule therein given to the pending draft. From the fact that there is no such proviso to the 14th section, it would seem that it was intended that credits should be given when mustering in under the pending call.

But the 14th section has a proviso, the peculiar language of which would, at first blush, seem to favor the idea that Congress intended that the rule in that section prescribed should be future to the pending call, and not future to the passage of the act. That proviso declares that credit shall not be given except for men actually furnished on said call, or the preceding call. The manifest purpose of the proviso is to limit the time within which a credit may be demanded.

This section must be regarded as taking effect from the passage of the act, unless such a construction is inconsistent with or forbidden by other parts of the act. ▀

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President's Power to Appoint to Office.

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As it is stated in my opinion to you of the 13th March, it appears from the face of this act that at the time it was passed there was a pending draft under a call for troops in December, 1864, and it is carefully provided that nothing in the act shall operate to postpone the pending draft, or interfere with the quotas assigned therefor. Now the rule for giving credits at the time of mustering in will not postpone the present draft, or interfere with the quotas assigned therefor. It seems to me that there is nothing in the act that prevents the application of the 14th section to the present draft, unless it may be the proviso thereto. It was intended by that proviso simply to limit the time within which credits might be claimed, and not to postpone the application of the rule of credits when mustering in to future calls.

I am of the opinion that the 14th section of said act is applicable to the call for troops made by the President on the 19th December, 1864.

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

Hon. EDWIN M. STANTON,

*Secretary of War.*

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PRESIDENT'S POWER TO APPOINT TO OFFICE.

Where the President made a temporary appointment of a Collector of Internal Revenue during a recess of the Senate, and no nomination was made during the next regular session, or during an extra session called thereafter, it was *held* that the President, after the adjournment of the extra session, might fill the vacancy by a second temporary appointment.

ATTORNEY GENERAL'S OFFICE,

*March 25, 1865.*

SIR: I have the honor to acknowledge the receipt of your letter of this date.

It appears that on the 8th day of July, 1864, a few days after the adjournment of Congress, a commission was

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Payment of Government Creditors in Bonds.

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issued by the President appointing Peter McGough collector of internal revenue for the 20th district of Pennsylvania, under which Mr. McGough qualified and entered upon the duties of his office. The commission of McGough expired on the 3d day of March last, that being the last day of the succeeding session of the Senate. There was a called session of the Senate on the 4th of March.

By an unfortunate oversight by one of the clerks in your Department the name of McGough was not sent into the session which succeeded his appointment, nor the called session.

You ask me whether, under that state of facts, the President can now fill the vacancy?

According to the opinions of my predecessors in this office, and in which I concur, he can fill the vacancy. (See Opinions of Attorney General Wirt, 1 Opins., 631; of Attorney General Taney, 2 Opins., 521; Attorney General Legare, 3 Opins., 673; Attorney General Nelson, 4 Opins., 523.)

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

Hon. HUGH McCULLOCH,

*Secretary of the Treasury.*

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PAYMENT OF GOVERNMENT CREDITORS IN BONDS.

Under the Act of March 3, 1865, "to provide ways and means for the support of the Government," the Secretary of the Treasury has the option to pay contractors for materials and supplies the amount of money called for by the requisitions, or to give such contractors bonds issued under authority of the act, when they have expressed a desire to subscribe to the loan thereby authorized.

ATTORNEY GENERAL'S OFFICE,

March 30, 1865.

SIR: On the 28th day of March, 1865, the Secretary of the Treasury addressed to you the following letter:

"In order to expedite the payment of the public credi-

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Payment of Government Creditors in Bonds.

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tors of the War Department, I have authorized J. Cooke & Co., in cases where it can be done without jeopardizing subscriptions, to make arrangements whereby parties holding vouchers, complete in all respects, ready for payment, and only waiting the receipt of moneys by the proper disbursing officers, to agree with such creditors to receive, in whole or in part, seven and three-tenth notes in liquidation of such indebtedness. This arrangement precludes the charging of any-commission, discount, percentage, or other expense to the holders of such vouchers, whereby any profit is derived by Messrs. Cooke & Co., who act simply as the agents of the Government. Whatever arrangement is made is to be communicated in full to this Department, so that, if approved by me, you may be requested to issue a requisition in fulfillment of such agreement.

“Arrangements have been made in accordance with the authority given Mr. Cooke, for the payment of vouchers on account of clothing and equipage to the extent of \$13,629,397 78, and I respectfully request that requisitions for the several amounts, as shown by the enclosed schedule, may be issued; and that instructions, in the forms enclosed, to the several quartermasters may be given by your Department.

“I hope by this means to further the interests of the Treasury, and certainly of the War Department, by the more prompt payment of its vouchers than for sometime heretofore. May I ask your immediate sanction and direction for the issuing and signing of the requisitions.”

The schedule mentioned in the letter was not sent with it.

You ask whether the mode of payment thus proposed by the Secretary of the Treasury is in conformity with law.

This arrangement is predicated upon an act of Congress entitled “An act to provide ways and means for the support of the Government,” approved March 8, 1865.

The first section of that act authorizes the Secretary of the Treasury to borrow, in addition to the sums heretofore

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Payment of Government Creditors in Bonds.

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authorized, "any sums not exceeding in the aggregate six hundred millions of dollars;" and to issue therefor interest bearing bonds. In the second section the Secretary of the Treasury is authorized, "at his discretion, to issue the bonds or treasury notes provided for in this act, for any requisitions for materials or supplies which shall have been made by the appropriate department or officer upon the Treasury of the United States, on receiving notice in writing through the department or office making the requisition that the owner of the claim for which the requisition issued desires to subscribe for an amount of loan that will cover said requisition or any part thereof."

This act does not authorize any department, in contracting for supplies or materials, to agree to pay therefor in the bonds or notes provided for in the act, nor does it authorize any department, where material and supplies have been furnished, to make a requisition for anything but money. All requisitions must be for money, but the creditor may, through the department or office to which he furnished the materials or supplies, give notice to the Treasury Department that he wishes to subscribe for an amount of the loan that will cover his requisition, or any part thereof. It is the duty of the department or office making the requisition to inform the Treasury Department in writing of the fact of such desire. Then the Secretary of the Treasury may or may not comply, at his discretion, with the wish of the creditor.

After a creditor of the Government for supplies or materials has signified his desire to subscribe for the loan for his whole claim, or any part thereof, he is bound thereby. He must take the bonds or the money, at the option of the Secretary of the Treasury. Hence it would seem to me to be right and proper that the department issuing the requisition and giving the notice should have some memorial of the request to subscribe to the loan. The departments or offices making requisitions for supplies or materials should, by appropriate regulations, say to whom the requests to subscribe to the loan should be made,

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Bonds for Pacific Railroad Company.

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and by whom, and in what form notice thereof should be given to the Treasury Department.

The result of all of which is, if the War Department is satisfied that the holders of the claims mentioned in the communication of the Secretary of the Treasury desire to subscribe to the loan provided for in the act aforementioned, it is the duty of that Department to give the notice. I cannot see that the fact of the evidence of request coming from or through J. Cooke & Co., or any one else, can affect or vary the rights and duties of the Department.

If the Secretary of the Treasury in his letter asks that the requisitions should be for bonds, of course you cannot so make them. As has been said before, all requisitions must be made for money; and when the owner of a claim desires to invest it in a loan, and the Department is satisfied thereof, notice of that fact should be given to the Secretary of the Treasury.

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

Hon. EDWIN M. STANTON,

*Secretary of War.*

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BONDS FOR PACIFIC RAILROAD COMPANY.

Authority of the several attorneys and agents of the Pacific Railroad Company to receive and assign the bonds deliverable to the Company under acts of July 1, 1862, and July 20, 1864.

ATTORNEY GENERAL'S OFFICE,

*April 1, 1865.*

SIR: I have the honor to acknowledge the receipt of your letter of the 27th ultimo, in which you state that the bonds authorized to be issued to the Pacific Railroad Company in obedience to the acts of Congress of July 1, 1862, and July 20, 1864, are in readiness.

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Bonds for Pacific Railroad Company.

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Before issuing the bonds you ask my opinion on two points, viz:

1. When issued to whom shall the bonds be delivered?
2. As the bonds issue to the company, whose assignment are we to recognize?

These questions are easily answered.

To the first: The bonds should be delivered to the company, or the authorized agents of the company.

To the second: The bonds being the property of the company must be assigned by the company, or a duly authorized agent.

From the papers that accompanied your letter, I infer that the real question upon which you desire my opinion is, whether George F. M. Davies, Esq., of New York, or Collis P. Huntington, Esq., is the agent of the company to receive and receipt for the bonds?

By a power of attorney, of date the 10th day of September, 1864, the Central Pacific Railroad Company of California make and constitute George F. M. Davies, Esq., of New York, the agent and attorney of the company to receive and receipt to the Government of the United States for any and all bonds of the United States now, or which may be hereafter, due to the company for thirty-one miles of the railroad of said company, under the report of the railroad commissioners, appointed and made in pursuance of the acts of Congress entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure the Government the use of the same for postal, military, and other purposes," approved July 1, 1862, and the act amendatory of said act, approved July 1, 1864.

On the 8th day of December, 1864, the Central Pacific Railroad Company of California, by resolution on their books, ordered that Collis P. Huntington, the vice-president of the company, be authorized and empowered to accept and receive from the Government of the United States bonds of the United States Government in such form, payable in coin or United States treasury notes or

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Bonds for Pacific Railroad Company.

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otherwise, at such rates of interest and payable at such date or dates as he may deem proper, in lieu of, or as a substitute for, the bonds provided to be issued, and to which the company is or may be entitled under the acts of Congress above mentioned. The president and secretary of the company are directed to execute a power of attorney to Mr. Huntington for the purpose aforesaid. In obedience to and conformity with this resolution, the president and secretary of the company executed a power of attorney to Mr. Collis P. Huntington, of date the 9th day of December, 1864.

In the authority thus conferred upon Huntington there is no express revocation of the authority to Davies; but is there not a revocation implied?

There seems to be a direct conflict between the two powers. Davies is authorized to receive the bonds that are or may become due from the Government for thirty-one miles of the railroad under a particular report. He is vested with no discretion of any kind. It is a purely naked authority to receive and receipt for the bonds to which the company may be entitled for thirty-one miles of the road. The power conferred upon Huntington is much larger and embraces that conferred upon Davies. Huntington is clothed with a discretion as to the form of the bonds, whether they are to be made payable in coin or treasury notes, or otherwise; what shall be the rate of interest; what to be the date or dates of the bonds, and when to be payable. Besides, on the very face of the authority to Huntington, it appears that the bonds, as to which he is to exercise his discretion and which he may agree to accept, are to be in lieu of, and as substitutes for, the bonds that had been theretofore expected to be issued. The power to Huntington is virtually a declaration by the company that the company will not receive any bonds except such as he may approve, and they must be in lieu and substitution for the bonds heretofore expected. From such a declaration it, of necessity, follows, that the power to Davies is revoked. The authority to Davies, being to



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Bonds for Pacific Railroad Company.

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receive bonds which the company have said, in their authority to Huntington, they will not take, is, of course, at an end. If any one has authority to receive the bonds, as to which Huntington exercises his discretion, and which are to be taken in lieu of, and substitutes for, the bonds previously provided for, it is Huntington.

But, if the Government is to issue the bonds decided upon prior to the 8th December, 1864, and without any exercise of discretion on the part of Mr. Huntington, who has authority to receive? Clearly neither Mr. Davies nor Mr. Huntington have any such authority.

As has been shown, the power to Mr. Davies has been revoked. He can receive neither the one kind nor the other; and the authority to Mr. Huntington is special, to receive such bonds only as he in his discretion may agree to take in lieu of, and substitutes for, the bonds provided to be issued. If the bonds now to be delivered are such as was decided upon prior to the 8th December, 1864, and as to the form of which Mr. Huntington exercised no discretion, and if they are not in lieu of, nor substitutes for, the bonds previously provided for, then Mr. Huntington has no authority to receive.

The power of attorney to Mr. Huntington has revoked the power to Mr. Davies, and has not conferred a like power on Mr. Huntington.

The power to Mr. Huntington seems to be in apt and sufficient form, and properly executed, but it discloses upon its face a desire rather to obtain bonds that may be agreed upon between the parties than to have received and receipted for such as are prescribed in the law, and is so very special that I could not advise the delivery of bonds upon it.

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

Hon. HUGH McCULLOCH,

*Secretary of the Treasury.*

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Credits on the Draft.

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## CREDIT OF SUBSTITUTES ON THE DRAFT.

1. A substitute liable to draft and enrolled must be credited to the place of his actual residence.
2. But if not liable to draft or enrollment, and is not enrolled, he may be credited to the locality in which his principal is drafted.

ATTORNEY GENERAL'S OFFICE,

April 11, 1865.

SIR: I have the honor to acknowledge the receipt of your letter of the 5th April, 1865, wherein you ask whether a substitute liable to draft shall be credited to the place of his residence or to the locality in which his principal is drafted?

In an opinion which I gave to you on the 15th March, 1865, I considered the 14th section of the act of Congress entitled "An act to amend the several acts heretofore passed to provide for the enrolling and calling out of the national forces, and for other purposes," approved March 3, 1865, as prescribing a rule of credits for enrolled men only. That section does not prescribe a rule by which credit is to be given for men not enrolled, although they may be liable to draft and should be enrolled.

I see no reason for changing the opinion then expressed.

According to that act all persons mustered into the military or naval service, whether as volunteers, substitutes, representatives, or otherwise, must be credited, if enrolled and liable to enrollment, where such persons belong by actual residence.

It seems to me, then, that if the substitute is liable to draft and has been enrolled, he must be credited to the place of his actual residence, and cannot be credited to the locality in which his principal is drafted.

On the other hand, if not liable to draft or enrollment, he has not been enrolled, he may be credited to the locality in which his principal is drafted.

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

Hon. EDWIN M. STANTON,

*Secretary of War.*

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**Bonds for Pacific Railroad Company.**

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**BONDS FOR PACIFIC RAILROAD COMPANY.**

Opinion of April 1, 1865, reaffirmed.

ATTORNEY GENERAL'S OFFICE,

*April 11, 1865.*

SIR: I have the honor to acknowledge the receipt of the additional papers submitted to me in the matter of the delivery of United States bonds to the Central Pacific Railroad Company of California, and enclosed in the letter of the Assistant Secretary of the Treasury dated 4th inst.

I have duly considered the legal effect of those documents in connection with the two powers of attorney respectively to F. M. Davies, Esq., of New York, dated September 10, 1864, and C. P. Huntington, dated December 8, 1864, on which I gave my opinion of the 1st instant, and I am unable to come to any different conclusion from that expressed in my former opinion.

It would have been more satisfactory, perhaps, when I had the subject in the first instance under consideration, if the entire series of powers had been presented to me. But I am of opinion that, on the whole case, if it had then been presented as it now is, I should not have given any different interpretation to the several transactions between the company and its respective agents, expressed by the documents submitted, than that which I gave to them in my first opinion.

I am of opinion, then, that by and under the several instruments referred to me, neither C. P. Huntington nor F. M. Davies is the authorized agent of the Central Pacific Railroad Company to receive, on behalf of the company from the Secretary of the Treasury, the bonds authorized to be issued and delivered to the said company by the acts of Congress of July 1, 1862, and of July 20, 1864, and that you should not deliver the said bonds to either of the gentlemen named, until he produces a duly executed power of attorney from the said company authorizing him to receive the bonds on its behalf.

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Duty of the Attorney General.

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I return herewith the papers enclosed to me, and my opinion of the 1st instant.

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

Hon. HUGH McCULLOCH,

*Secretary of the Treasury.*

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DUTY OF THE ATTORNEY GENERAL.

1. The Attorney General will not give a speculative opinion on an abstract question of law which does not arise in any case presented for the action of an Executive Department.
2. Nor will he review the opinion of a former Attorney General, unless a proper case is presented therefor, and submitted by the Head of a Department.

ATTORNEY GENERAL'S OFFICE,

April 11, 1865.

SIR: I have the honor to acknowledge the receipt of a letter from your Department, signed by the Assistant Secretary of War, submitting to me several papers, and requesting that your Department "may be advised of my views in regard to the opinion of Attorney General Toucey, in 1848, and of the recent decision of the Secretary of the Interior, and the Commissioner of Pensions, to the effect that additional paymasters are in the civil service, and, therefore, not entitled to pensions."

I beg to say, that it would give me great pleasure to comply with the request contained in Mr. Dana's letter, if I could clearly see that it is proper for me to do so, in view of the law which prescribes the duties and limits the powers of this office.

I am sure, when I state to you the contents of the papers that have been enclosed to me, you will entirely agree with me, that I ought not, in the case therein presented, to give an official opinion to your Department on the question to which my attention is called. I believe also, that if you

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Duty of the Attorney General.

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- assent that far to my determination, you will also agree with me, that I ought not to give a speculative opinion upon an abstract question of law, which has at present, so far as I can see, or am informed, no practical interest to your Department, as connected with, or arising in, any case presented for its action.

The case which called forth the letters of the acting Paymaster General to you seems to have been that of Major George B. Ely, an additional paymaster, who appealed to the Secretary of the Interior from a "decision" of the Commissioner of Pensions, adverse to the continued right of that officer to receive a pension awarded to him under the act of 1862, for a disability which he incurred when a captain of Wisconsin volunteers in the military service of the United States. The Secretary of the Interior having been of opinion that Major Ely, when he became a paymaster, was transferred to a "civil branch of the service," within the meaning of the act of April 30, 1844, determined that his right to the continued receipt of the pension awarded to him as captain in the line of the volunteer service was not affected or impaired when he entered the pay department of the army: and in so deciding, reversed the action of the Commissioner of Pensions in disallowing Major Ely's pension.

That officer is now in the enjoyment of his pension under the action and opinion of the head of the Interior Department. When his case was before the Secretary of that Department, and the question as to the proper construction and effect of the act of 1844, and of the statutes relative to paymasters of the army, was presented to the Secretary for his determination, the opinion of the Attorney General was not asked or taken on the subject. The Secretary seems to have had no doubt touching the law of the case or of the question. If he had had any such doubt he would probably have submitted the question to this office, and then it would have been the duty of the Attorney General to give his official opinion on that question. The Secretary of the Interior had full jurisdiction to decide the

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Duty of the Attorney General.

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point presented in Major Ely's case, and no other department had or has authority over the case. The opinion of this office would only have been advisory after all. The determination of the Secretary was and is, therefore, final, as between the executive department of the Government and the pensioner. On some other occasion he may choose to review his opinion, and submit the question to me, when I will be bound to answer it.

If I should now give you an opinion in Major Ely's case I would place this office in the ungracious position of sitting, so to speak, in judgment on the application of another co-ordinate executive department upon the decision of the Secretary of the Interior, in a case of which he had complete and lawful jurisdiction. I am sure that if the Secretary of the Interior should ask me to revise in an official opinion your action, without your consent, in a case of which you had complete jurisdiction, you would regard a compliance on my part as eminently improper and officious.

Besides this, see how my opinion, if I should be opposed to the view of the Secretary of the Interior, would or might affect the pensioner. The law has authorized the Secretary of the Interior to determine his right to receive the pension, which it seems he claimed. The Secretary has determined in favor of his right, and Major Ely is in the receipt of the present pension, under and by virtue of that decision. I am now asked to review, not by him, but by you, the action of the Secretary, and to prepare an opinion which possibly might be adverse to the right which he enjoys in pursuance of the action of the proper authority. Whatever effect such opinion might have, and I can well imagine how it might affect Major Ely seriously in some respects, I am sure you will appreciate the official delicacy which prevents me from determining a question in which he is deeply concerned, without having acquired, by submission of the proper department, any jurisdiction over him or his case.

For these reasons, and others that might be suggested,

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Duty of the Attorney General.

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I must respectfully decline, in Major Ely's case, giving my "views" on the question indicated in Mr. Dana's letter.

It seems to me to proceed naturally and necessarily from what I have said, that it would also be improper for me to review speculatively an opinion of a former Attorney General before an occasion is presented for its consideration by me in a case submitted for the action of your Department. I am not informed, and cannot see from your letter, that any case has arisen in your Department in which the doctrine of Attorney General Toucey's opinion, given in 1848, is involved. No case whatever is stated for my consideration as having arisen in your Department by Mr. Dana, and the papers referred to me show that the only case which has yet arisen anywhere, calling for a consideration of Mr. Toucey's views, is that of Major Ely, in which, as I have determined, I can give no opinion as it now stands.

So far as I am at present able to see, therefore, any opinion that I should now prepare would be upon a hypothetical case, entirely theoretical in its character, and thus not within the statute of 1789, prescribing the duties of the Attorney General.

Let me say, sir, in conclusion, that I will be most happy, when I am informed by you that a case is presented for the action of your Department in which the question referred to is involved, and you request my opinion on it, to give it my best attention and judgment.

I return herewith the letters enclosed with Mr. Dana's communication.

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

Hon. EDWIN M. STANTON,

*Secretary of War.*

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Pay of "Under-Cooks of African Descent."

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## PAY OF "UNDER-COOKS OF AFRICAN DESCENT."

"Under-cooks of African descent," enlisted under the authority of the act of March 3, 1863, section 10, are not entitled to receive any other and greater compensation than that provided by that statute.

ATTORNEY GENERAL'S OFFICE,

*April 12, 1865.*

SIR: I have the honor to acknowledge the receipt of a letter from your Department, submitting to me a communication addressed to the Paymaster General, relative to the compensation of "under-cooks of African descent," enlisted under the authority of the 10th section of the act of March 3, 1863, (12 Stats., 744,) together with a memorandum addressed to the Adjutant General of the army by the Paymaster General on that subject, and requesting me to advise your Department of my opinion "as to the proper construction to be given to section 4 of the act of June 15, 1864, fixing the pay of persons of color enlisted into the military service of the United States."

It would have been more regular if the Assistant Secretary of War, who prepared the foregoing letter, had distinctly stated the precise question of law on which the Department desired my opinion, and, in connection with a statement of that question, had referred to those statutes which may be supposed to have a bearing on the point of doubt or difficulty. The "proper construction" of the 4th section of the act of June 15, 1864, presents, it must be conceded, a very wide field for thought and discussion; and, if it were not for the aid afforded by the papers enclosed with the letter from your Department, I should scarcely know to what particular point of that field you desired me to direct my attention.

I understand, however, the question on which you desire my opinion to be, whether "under-cooks of African descent," whom the President may have caused, or may cause, to be enlisted, pursuant to the authority conferred upon him by the 10th section of the act of 3d March, 1863,

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Pay of "Under-Cooks of African Descent."

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are entitled by law to receive any other and greater compensation than the compensation provided by that statute?

- The 10th section of the act of March 3, 1863, provides as follows:

"That the President of the United States be, and he is hereby, authorized to cause to be enlisted for each cook two under-cooks of African descent, who shall receive for their full compensation ten dollars per month and one ration per day; three dollars of said monthly pay may be in clothing."

If the persons named in this enactment are entitled to any other and greater compensation than that thereby provided—ten dollars per month and one ration per day—they must be so entitled, it is conceded, by the effect of the words of the 2d and 4th sections of the act of June 15, 1864. (13 Stats., 129.) I am not able, however, to perceive how, by any process of construction, persons of color, enlisted as "under-cooks," pursuant to the statute of 1863, can be embraced within either the letter or the spirit of the statute of 1864. It is apparent everywhere, I think, on the face of that enactment, and throughout its underlying spirit, that persons of color who have entered the military service of the United States as soldiers are alone entitled to the benefits which it was intended to confer, and that the enactment was not designed to repeal antecedent legislation, which fixed the compensation of persons of color who might be employed or enlisted for the performance of other duties in the service than those that belong and appertain to the character of United States soldiers.

What is the language of the 2d section? It is, "that all persons of color that have been or may be mustered into the military service of the United States, shall receive the same uniform, clothing, arms, equipments, camp equipage, rations, medical and hospital attendance, pay and emoluments, other than bounty, as other soldiers of the regular or volunteer forces of the United States, of like arm of the service, from and after the 1st day of Jan-

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Pay of "Under-Cooks of African Descent."

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uary, 1864." The provision contained in these words, and in the following words of the same section, simply is, in effect, that colored persons who have been or may be mustered into the military service of the country shall stand upon the same footing, in the respects enumerated, as other soldiers of like arm of the service. Colored persons claiming the benefit of the provisions of the law that has been cited must claim, therefore, as soldiers.

Are "under-cooks of African descent," enlisted under the authority of the President, and in pursuance of the statute of 1863, "soldiers" in the military service of the United States? I think that they are no more nor less than "under-cooks," as they are styled in the statute. Their functions, employments, duties, and qualifications, are not those belonging and appertaining to soldiers.

The cooks of the various companies in the service are soldiers; for, under the 9th section of the act of 1863, they are "detailed in turn from the privates of each company of troops in the service of the United States, at the rate of one cook for each company numbering less than thirty men, and two cooks for each company numbering over thirty men, who shall serve ten days in each." In other words, the statute superadds to the character of soldier the character of cook in the case of each private of a company in his turn. But the "under-cooks of African descent" have no other character than that of "under-cooks" attributed to or conferred upon them by the statute. These employes are not even, under the language of the statute, directly connected with the military organizations with which they serve, although they are indirectly so connected. Their first and direct relation is to the cooks of the several companies in the service. The language of the act is, that there "shall be enlisted for each cook two under-cooks of African descent." The provision of the section providing for the cooks is, that there shall be detailed a private to act as cook "for each company;" so that the "under-cooks" are only indirectly connected

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Pay of "Under-Cooks of African Descent."

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with the companies with which they serve. They are primarily attachés of the company cooks.

There was, perhaps, ample statutory authority in the President, before and without the act of 1863, to employ and enlist persons of African descent to perform duty in the military service as under-cooks; for the act of July 17, 1862, chap. 201, (12 Stats., 399,) embraces all such employment as that contemplated by their case. The persons employed under the authority of the act of 1862 receive the same pay as is provided for "under-cooks by the act of 1863.

The opinion has been expressed several times by this office that colored soldiers, enlisted and mustered into the service, were not so enlisted under the act of 1862, to which I have above referred; and that there never existed any statute of the United States which prohibited, directly or indirectly, the enlistment of colored men into the military service as soldiers.

The employment, however, of persons of African descent to perform camp service, or to do the duty of under-cooks, is quite another case, for which Congress has provided special legislation, regulating the pay and emoluments of such employes by the acts of 1862 and 1863; and the act of 1864 was not intended, I apprehend, to repeal antecedent and existing legislation with regard to such persons.

This view of the construction and legal effect of the 2d section of the act of June 15, 1864, renders it unnecessary to consider the effect of the 4th section of that act, which provides "that persons of color who were free on the 19th of April, 1861, and who have been enlisted and mustered into the military service of the United States, shall receive the pay, bounty, and clothing allowed to such persons by the laws existing at the time of their enlistments."

"Under-cooks of African descent," enlisted by the authority of the President and in pursuance of the act of 1863, are not, in my opinion, within the terms of any of the provisions of the act of 1864; and their compensation

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Sale of Lands of Incompetent Wyandott Indians.

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is, therefore, in my judgment, no other and greater than that authorized and allowed them by the 10th section of the act of March 3, 1863.

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

Hon. EDWIN M. STANTON,

*Secretary of War.*

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SALE OF LANDS OF INCOMPETENT WYANDOTT INDIANS.

Construction of the article of the treaty of January, 18, 1855, with the Wyandott Indians, relative to the sale of lands allotted to the incompetent members of the tribe.

ATTORNEY GENERAL'S OFFICE,

April 17, 1865.

SIR: I am in receipt of your letter of the 4th instant, propounding to me three questions, which have arisen upon the proper construction of the treaty of January 13, 1855, with the Wyandott Indians, (10 Stats., 1159.)

The first question is, "has an incompetent Wyandott" the right to convey, with the consent of the President of the United States, by deed, in fee simple, the lands allotted under the said treaty, and for which a patent was issued and delivered to him more than five years since; or is his right of alienation limited in all cases to leasing such land for a period not exceeding two years?"

By the second article of the treaty, the Wyandott nation ceded and relinquished to the United States all their right, title, and interest in and to the tract of country situate in the fork of the Missouri and Kansas rivers, the object of the cession being that the lands should be subdivided, assigned, and re-conveyed by patent, in fee simple, to the individuals and members of the Wyandott nation in severalty. The third article of the treaty provides for the ap-

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Sale of Lands of Incompetent Wyandott Indians.

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pointment of three commissioners to make division and assignment of the lands among the families and individuals of the tribe, and also to "make up carefully-prepared lists of all the individuals and members of the Wyandott tribe," which lists the treaty provides "shall exhibit separately, first, those families, the heads of which the commissioners, after due inquiry and consideration, shall be satisfied are sufficiently intelligent, competent, and prudent to control and manage their affairs and interests, and also all persons without families; second, those families, the heads of which are not competent and proper persons to be intrusted with their shares of the money payable under this agreement; and, third, those who are orphans, idiots, or insane."

When copies of the lists of the second and third of the above classes shall have been presented to the Wyandott council, it is provided in the same article that the same body shall "proceed to appoint or designate the proper person or persons to be recognized as the representatives of those of the second class, for the purpose of receiving and properly applying the sums of money due and payable to or for them, as hereinafter provided, and also those who are to be intrusted with the guardianship of the individuals of the third class, and the custody and management of their rights and interests."

The fourth article provides for the issuing of patents by the General Land Office for the individuals of the tribe for the lands severally assigned to them. The patents issued to "those reported to be competent to be intrusted with the control and management of their affairs and interests" are to contain an absolute and unconditional grant in fee simple; but the patents in favor of "those not so competent" contain an express condition that the lands are not to be sold or alienated for a period of five years, and not then without the express consent of the President of the United States first being obtained."

With reference to the second class of patents, the treaty provides "that they may be withheld by the Commissioner

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**Sale of Lands of Incompetent Wyandott Indians.**

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of Indian Affairs, so long as in his judgment their being so withheld may be made to operate beneficially upon the character and conduct of the individuals entitled to them." The treaty then declares that the lands of "the incompetent classes shall not be aliened or leased for a longer period than two years, and shall be exempt from levy, sale, or forfeiture until otherwise provided for by State legislation, with the assent of Congress."

The first question above stated may be now answered without difficulty. I am of opinion that an "incompetent Wyandott," after the expiration of five years from the delivery of his patent, and after the consent of the President has been obtained to his aliening the land, has no power, under the treaty of 1855, without the authority of State legislation which has received the assent of Congress, to convey a greater interest in the land assigned to him in pursuance of the treaty stipulations than a leasehold interest for two years. He cannot alien the land at all until after five years from the delivery of the patent; even then he has no authority to convey without the consent of the President, and even with such consent he cannot alien or lease the land for a longer period than two years, "until otherwise provided by State legislation with the assent of Congress."

The second question you state in the following words:

"Are the lands of such incompetent Indians subject to sale in fee simple by the decree of the proper court, upon the application of the guardian to raise means for the support and maintenance of such incompetents?"

I am of opinion that, by the provisions of the treaty, land assigned to an individual of the "incompetent classes" of the Wyandotts is entirely exempt from judicial sale until Congress has given its consent to the removal of that exemption. The language of the treaty is, "those [the lands] of the incompetent classes shall not be aliened or leased for a longer period than two years, and shall be exempt from levy, sale, or forfeiture until otherwise provided by State legislation, with the assent of Congress."

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Sale of Lands of Incompetent Wyandott Indians.

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No State court, I apprehend, therefore, has power to order the sale of such lands until the Legislature of Kansas has provided for the exercise of jurisdiction by the courts in the case of those lands, and such legislation has been assented to by the Congress of the United States. The specific question you ask is, whether such lands are subject to sale in fee simple, on application of guardians, by decree of the proper court? As I read the treaty, they are not liable to sale at all until State legislation provides for their sale, with the assent of Congress. *A fortiori*, they are not subject to sale in fee simple until legislative provision has been made and the consent of Congress has been obtained to that end.

The law of the treaty, and not the law of the State, must prevail, if there be any conflict between them on this subject. The grantees of the lands in question hold under and subject to the provisions of the treaty. The State cannot enlarge or defeat their title; and the rule of decision upon any question relating to the character and extent of the interest in the lands given by the United States to these grantees must be found within and taken from the treaty.

The third question is, "without the State legislation contemplated in the fourth article of the treaty, with the assent of Congress thereto, are the lands of such 'incompetent classes' liable to levy, judicial sale, or to forfeiture for non-payment of taxes?"

I have already substantially answered this question. The treaty declares that the lands of the incompetent classes "shall be exempt from levy, sale, or forfeiture, [forfeiture for any cause,] until otherwise provided by State legislation, with the assent of Congress."

Whether these lands, after the expiration of five years from the organization of a State government over the territory are, like the rest of the Wyandott lands, after that period, subject to taxation, I do not determine; but, whether so subject or not, there exists no power in the State lawfully to subject the lands in question to levy, sale, or for-

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Purchase of Land on Account of the United States.

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feiture for non-payment of taxes, or for any other reason, without the assent of Congress.

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

Hon. JOHN P. USHER,

*Secretary of the Interior.*

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PURCHASE OF LAND ON ACCOUNT OF UNITED STATES.

1. An act of Congress appropriating a sum of money "for permanent defences at Narragansett bay" will not authorize the purchase, on account of the United States, of a tract of land as a site for a proposed fort at the place mentioned in the statute.
2. Construction and effect of the 7th section of the act of May 1, 1820.

ATTORNEY GENERAL'S OFFICE,

April 20, 1865.

SIR: You have asked my opinion on the question, whether the sum of one hundred and fifty thousand dollars, appropriated by the act of Congress of February 20, 1863, (12 Stats., 655,) "for permanent defences at Narragansett bay, Rhode Island," is lawfully available for the purchase, on account of the United States, of a tract of land known as "Dutch island," as a site for one of the proposed defences at the place indicated in the statute?

The doubt upon the point has arisen under the provision of the 7th section of the act of May 1, 1820, (5 Stats., 568,) which declares "that no land shall be purchased on account of the United States except under a law authorizing such purchase." This is a general and permanent enactment, and the doubt which has been suggested must be held to be well founded, and incapable of being resolved in favor of the right of the Department to purchase the land in question, unless the words of the act of 1863, which have been quoted, are legally capable of being construed as conferring authority on the Department to make the



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proposed purchase. Certainly the words of the act do not expressly confer that authority. The power to purchase land, from the authority conferred to construct "permanent defences," must be derived, if derived at all, by implication from those words. The chief engineer of the army, in his letter to you of the 8th instant, has defined, with technical precision, what is meant scientifically by "permanent defences." I quote his words: "Technically, permanent defensive structures are those built for the continued and permanent defence of our cities, naval depots, and harbors, and are, as far as practicable, of imperishable or permanent and durable materials, and in contradistinction to temporary or field fortifications, which are for armies changing their position from time to time, and such as are hastily constructed for the defence of localities occupied temporarily by armies contending with armies in the field, or against fleets, when time or other causes have not permitted the construction of permanent defences." *Vide* also article "Fortification," *Encyclopedia Britannica*, (8th edition, vol. 1, p. 817.)

It is clear, then, that the power to construct such defences as are thus described, and to purchase materials therefor, may be executed entirely well without the exercise of a power to purchase land, although it will be readily conceded that the United States, in most cases, before expending money for the purchase of materials necessary in the construction of defences of this description, and for the erection of such works, as a matter of proper precaution and prudence, should become the owner of the sites on which they are to be reared. The power in question being derivable, therefore, only by implication from the authority conferred by the statute, the question is, whether we are at liberty, in view of the general and permanent prohibition contained in the statute of 1820, to determine that the power conferred on the executive department by the act of 1863 embraces a power so clearly merely incidental to the one conferred.

I am of opinion that we are not, and that the general

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Purchase of Land on Account of the United States.

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effect of the act of 1820, is to render the exercise by an executive department of a power to purchase land on account of the United States illegal, unless the intention of Congress that such a power should be exercised has been so clearly expressed in the law which is invoked as containing the authority, that the power may be said to be an express one under the words of that law.

I have already shown that the authority to purchase land, as a site for one of the proposed defences at Narragansett bay, is not expressly conferred in the sense just indicated by the act of 1863. The operation of the act of 1820, then, is to defeat the exercise of that authority on the principle which I have enunciated. It is plain, that to give any other effect to the act of 1820 than that to which I have referred would be to nullify it, or to impair its efficiency.

There never was a time in the history of this Government when the purchase of land on account of the United States without authority of law was a legal act on the part of the Executive. What effect, then, can the act of 1820 have, as a substantive expression of the will of Congress, unless that of prohibiting the purchase of real estate on account of the United States under merely implied authority? I can conceive of none.

I need not pursue the subject further. But, by way of illustrating what precedent Congress has itself established in favor of the legal view I have here taken, I may refer to the act of April 29, 1824, (4 Stats., 22,) which authorized the construction of the work at Brenton's point, Narragansett bay, in which the following form of language was employed: "For the purchase of a site and collecting materials for the projected work at Brenton's point, Narragansett bay, Rhode Island, fifty thousand dollars." There the purchase of the land was distinctly and expressly authorized, as well as the purchase of materials for the construction of the defensive works. It would have been well if the same form of enactment had been pursued in the statute of 1863, as the purchase of sites at Narragansett

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Surrender of the Rebel Army of Northern Virginia.

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bay was, no doubt, within the contemplation of the legislature, though we cannot say so as a matter of law.

I am of opinion, therefore, that without further legislation the money appropriated by the act of February 20, 1863, cannot be applied for the purchase of land for the purpose indicated.

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

Hon. EDWIN M. STANTON,  
*Secretary of War.*

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SURRENDER OF THE REBEL ARMY OF NORTHERN VIRGINIA.

1. By the terms of the surrender to General Grant of the army under the rebel Lee, on the 9th of April, 1865, the officers of that army who resided before the rebellion in the loyal States and went to Virginia or elsewhere and entered into the rebel service, are not entitled to return to their former homes in the loyal States.
2. Persons in the civil service of the rebellion are not embraced by the terms of the surrender of that army.
3. Officers of that army have no right after the surrender to wear their uniforms in public in the loyal States.

ATTORNEY GENERAL'S OFFICE,

*April 22, 1865.*

SIR: I have the honor to acknowledge the receipt of your letter of the 22d of April. In it you ask me three questions, growing out of the capitulation made betwixt General Grant, of the United States army, and General Lee, of the rebel army.

You ask, first, whether rebel officers, who once resided in the city of Washington and went to Virginia or elsewhere in the South and took service, can return to the city under the stipulation of the capitulation, and reside here as their homes? Second, whether persons who resided in Washington about the time the rebellion broke out, left

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*Surrender of the Rebel Army of Northern Virginia.*

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the city, and went to Richmond, where they have adhered to the rebel cause, entered into the civil service, or otherwise given it their support, comfort, and aid, can return to Washington since the capitulation of Lee's army and the capture of Richmond, and reside here under the terms of the capitulation? Third, you state that since the capitulation of General Lee's army, rebel officers have appeared in public in the loyal States wearing the rebel uniform; and you ask whether such conduct is not a fresh act of hostility on their part to the United States, subjecting them to be dealt with as avowed enemies of the Government.

Your letter is accompanied with a copy of the terms of capitulation entered into betwixt Generals Grant and Lee. It is as follows:

"Rolls of all the officers and men to be made in duplicate, one copy to be given to an officer designated by me, the other to be retained by such officer or officers as you may designate. The officers to give their individual paroles not to take arms against the Government of the United States until properly exchanged, and each company or regimental commander sign a like parole for the men of their commands. The arms, artillery, and public property to be packed and stacked, and turned over to the officers appointed by me [General Grant] to receive them. This will not embrace the side-arms of the officers, nor their private horses, nor baggage. This done, each officer and man will be allowed to return to their homes, not to be disturbed by United States authority so long as they observe their parole and the laws in force where they reside."

1. In giving construction to these articles of capitulation, we must consider in what capacity General Grant was speaking. He of course spoke by authority of the President of the United States as commander-in-chief of the armies of the United States. It must be presumed that he had no authority from the President, except such as the commander-in-chief could give to a military officer.

The President performs two functions of the Govern-

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Surrender of the Rebel Army of Northern Virginia.

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ment, one civil, the other military; as President of the United States, and its civil head, he possesses the pardoning power; as President of the United States he is commander-in-chief of the armies of the United States, and is the head of its belligerent power. His power to pardon, as a civil magistrate, cannot be delegated; it is a personal trust, inseparably connected with the office of President. As commander-in-chief of the armies of the United States, he has, of necessity, to delegate a vast amount of power. Regarding General Grant, then, purely as a military officer, and that he was speaking as one possessing no power except belligerent, and considering that fact to be well known to the belligerents with whom he was making the stipulation, let us come to the consideration of the first question which you have propounded.

It must be observed that the question is not as to the extent of the power that the President, as commander-in-chief of the armies, possesses; it is not whether he, as commander-in-chief of the armies of the United States, could grant parole, by virtue of his military authority, to rebels to go and reside in loyal communities, communities that had not been in rebellion against the Government of the United States; but the question is whether, by and under the terms of the stipulation, he has granted such permissions.

In the cases in 2 Black, commonly called the Prize Cases, the Supreme Court of the United States decided that the rebels were belligerents; that this was no loose and unorganized insurrection, without defined boundary, but that it had a boundary marked by lines of bayonets, which can only be crossed by force; that south of that line is enemy's territory, because claimed and held by an organized, hostile, and belligerent power; that all persons residing within that territory must be treated as enemies, though not foreigners; and it is well settled that all persons going there without license, pending the hostilities, or remaining there after hostilities commenced, must be regarded and treated as residents of that territory. It follows, as a

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*Surrender of the Rebel Army of Northern Virginia.*

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matter of course, that residents of the territory in rebellion cannot be regarded as having homes in the loyal States. A man's home and his residence cannot be distinct the one from the other. The rebels were dealt with by General Grant as belligerents. As belligerents, their homes were, of necessity, in the territory belligerent to the Government of the United States. The officers and soldiers of General Lee's army, then, who had homes prior to the rebellion in the northern States, took up their residences within the rebel States and abandoned their homes in the loyal States, and when General Grant gave permission to them, by the stipulation, to return to their homes, it cannot be understood as a permission to return to any part of the loyal States. That was a stipulation of surrender, and not a truce. Vattel lays it down (p. 411) that "during the truce, especially if made for a long period, it is naturally allowable for enemies to pass and repass to and from each other's country, in the same manner as it is allowed in time of peace, since all hostilities are now suspended; but each of the sovereigns is at liberty, as he would be in time of peace, to adopt every precaution which may be necessary to prevent this intercourse from becoming prejudicial to him. He has just grounds of suspicion against people with whom he is soon to recommence hostilities. He may even declare, at the time of making the truce, that he will admit none of the enemy into any place under his jurisdiction.

"Those who, having entered the enemy's territories during the truce, are detained there by sickness, or any other unsurmountable obstacle, and thus happen to remain in the country after the expiration of the armistice, may, in strict justice, be kept prisoners; it is an accident which they might have foreseen, and to which they have, of their own accord, exposed themselves; but humanity and generosity commonly require that they should be allowed a sufficient term for their departure.

"If the articles of truce contain any conditions either more extensive or more narrowly restrictive than what we

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have here laid down, the transaction becomes a particular convention. It is obligatory on the contracting parties, who are bound to observe what they have promised in due form; and the obligations thence resulting constitute a conventional right."

Now, if the rights of enemies, during a long truce and suspension of hostilities, are thus restricted, it would seem evident that their rights under a stipulation of surrender, without any suspension of hostilities, could not, without express words in the stipulation to that effect, be anything like as large as under a truce and suspension of hostilities.

Regarding General Grant, then, as speaking simply as a soldier, and with the powers of a soldier; regarding this war as a territorial war, and all persons within that territory as residents thereof, and, as such, enemies of the Government; and looking to the language of the stipulation, I am of opinion that the rebel officers who surrendered to General Grant have no homes within the loyal States, and have no right to come to places which were their homes prior to their going into the rebellion.

II. As to your second question: The stipulation of surrender made betwixt Generals Grant and Lee does not embrace any persons other than the officers and soldiers of General Lee's army. Persons in the civil service of the rebellion, or who had otherwise given it support, comfort, and aid, and were residents of the rebel territory, certainly have no right to return to Washington under that stipulation.

III. As to the third question: My answer to the first is a complete answer to this.

Rebel officers certainly have no right to wear their uniforms in any of the loyal States. It seems to me that such officers, having done wrong in coming into the loyal States, are but adding insult to injury in wearing their uniforms. They have as much right to bear the traitor's flag through the streets of a loyal city as to wear a traitor's garb. The stipulation of surrender permits no such

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thing, and the wearing of such uniform is an act of hostility against the Government.

I am, sir, very respectfully,  
Your obedient servant,

JAMES SPEED.

Hon. E. M. STANTON,  
*Secretary of War.*

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APPOINTMENT OF ASSISTANT ASSESSORS OF INTERNAL  
REVENUE.

1. The 1st section of the act of March 3, 1865, providing for the appointment of assistant assessors of internal revenue by the assessors, is unconstitutional.
2. The 16th section of that act, repealing all provisions of any former act inconsistent therewith, repealed so much of the act of June 30, 1864, as conferred on the Secretary of the Treasury the power of appointing, with the approval of the Commissioner of Internal Revenue, the assistant assessors.
3. Under these circumstances, the President, since the passage of the act of March 3, 1865, is authorized to commission the assistant assessors.
4. It is the duty of the President, before any judicial determination has been had of the constitutionality of the provision of the act of March 3, 1865, before mentioned, to exercise his constitutional power of appointment in the case of assistant assessors.

ATTORNEY GENERAL'S OFFICE,

*April 25, 1865.*

SIR: I have duly considered the important and interesting questions suggested by the Commissioner of Internal Revenue, touching the recent legislation of Congress with reference to the office of assistant assessor of internal revenue, which you have submitted to me for my opinion.

The questions may be thus stated:

I. Whether the provision of the act of March 3, 1865, vesting the appointment of assistant assessors in the assessors of the respective assessment districts, is constitutional?



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II. If it be unconstitutional, in whom is the power of appointing assistant assessors by law vested?

III. If the President is by law vested with that power, should he exercise it, against the express provision of the act of Congress, before any judicial determination has been had of the two preceding questions?

I. The 1st section of the act of March 3, 1835, provides, that within each assessment district the "assessor, whenever there shall be a vacancy, shall appoint, with the approval of said Commissioner, one or more assistant assessors, who shall be a resident of such assessment district."

The question suggested by this enactment is, whether it was constitutionally competent for Congress to confer on the assessors the power of appointing their assistants? The Constitution provides (sec. 11, art. 11) that the President "shall nominate, and, by and with the advice and consent of the Senate, shall appoint, ambassadors, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law. But the Congress may by law vest the appointment of such inferior officers as they think proper in the President alone, in the courts of law, or in the heads of departments." This is the constitutional provision which the act of 1865 may be supposed to infringe. Manifestly, the statute is in violation of the constitutional provision, if the assistant assessors are, within the meaning of the Constitution, "officers" of the United States. Congress is not competent to confer the power of appointing officers of the United States on any public authority, save the President, the courts, or the heads of departments. The legal character of the place or position of assistant assessor is, therefore, the first point for determination. I will not venture to frame a general definition of the meaning of the words "officer" and "office," as they are used in the Constitution. Blackstone has attempted to give such a definition of the legal meaning of the second of these terms, (2 Com. 36.) But he has done nothing more than substitute one abstract term for another. He defines an

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"office" to be an "employment." But Chief Justice Marshall has well said, "although an office is an 'employment,' it does not follow that every employment is an office. A man may certainly be employed under a contract, express or implied, to do an action or perform a service, without becoming an officer." (*United States vs. Maurice*, 2 Brock., 103.) With his usual power of legal discrimination, the great Chief Justice has, in the same case, distinguished those employments that may properly be termed "offices" from that other class to which he refers. "If a duty," he says, "be a continuing one, which is defined by rules prescribed by the Government and not by contract, which an individual is appointed by Government to perform, who enters on the duties appertaining to his station without any contract defining them, if those duties continue, although the person be changed, it seems very difficult to distinguish such a charge or employment from an office, or the person who performs the duties from an officer."

I think that the act of Congress establishing the place of assistant assessor, and prescribing its powers, functions, and duties, constitutes it, in the strictest legal sense, an "office." The internal revenue code of June 30, 1864, (13 Stats., 224,) specifically so terms it, in prescribing the oath which every assistant assessor is required to take before entering upon his duties. And what is the nature of those duties? One point of inquiry would be, whether they are the duties of another, which he performs in right of, and by deputation from that other? They are not of that character. The statute carefully prescribes the sphere of his authority, but within that sphere he performs the duties and exercises the powers devolving upon him in subordination and under responsibility only to the law, whose agent, in truth, he is. The assessor may re-examine and rectify his assessments, but only as a court of error may revise and correct the decisions of inferior tribunals on appeal. I have no difficulty, then, in determining that an assistant assessor is an "officer,"

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in the meaning of the Constitution. The tests that I have applied in ascertaining the legal character of his employment were those adopted, with like result, in the case of inspectors of the customs, under the acts of 1799 and 1815, by my predecessors, Mr. Wirt, Mr. Berrien, and Mr. Legare. All of these distinguished gentlemen were of opinion that the inspectors contemplated by those statutes were to all intents and purposes officers of the United States, and not the deputies, employés, or agents of the collectors.

Mr. Legare was of opinion, consequently, that if the act of 1799 contemplated the appointment of occasional inspectors by the collectors, it was null and void, and that its constitutionality could only be upheld on the construction that the statute contemplated the Secretary of the Treasury as the appointing power. (2 Op., 413; 4 Op., 164.)

I am of opinion, therefore, that the provision of the act of 1865, to which I have referred, vesting the power of appointing assistant assessors in the respective assessors, is clearly unconstitutional.

II. The second question is, in whom is the authority of appointing those officers by law now vested? The 16th section of the act of 8d March, 1865, enacts, "that all provisions of any former act inconsistent with the provisions of this act are hereby repealed." The effect of this provision is to repeal so much of the act of June 30, 1864, (13 Stats., 224,) as conferred on the Secretary of the Treasury the power of appointing, with the approval of the Commissioner of Internal Revenue, the assistant assessors. If the provision had not been introduced into the new statute, and the statute had simply changed the appointing authority, the effect of vesting the power of appointment in an officer incapable of constitutionally exercising it would have been to revive the authority previously conferred on the Secretary of the Treasury. But the act of 1865, besides conferring, or attempting to confer, on the assessors the appointment of their assistants, repeals the provision of the act of 1864, which gave that authority,

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and constitutionally gave it, to the Secretary of the Treasury.

That repeal Congress, of course, was entirely competent to effect. The law, therefore, has established an office, and not designated any competent public authority as authorized to appoint the officer. On whom, then, devolves the power of filling the office?

I am of opinion that the President is by the Constitution vested with authority to appoint assistant assessors under the existing circumstances. The Constitution confers on the President the power to nominate, and, by and with the advice of the Senate, to appoint, all officers of the United States whose appointments are not in the instrument otherwise provided for, and whose offices shall be established by law. In the case of "inferior officers," Congress may provide for their appointment by the President alone, the heads of departments, or the federal tribunals. When Congress creates such offices and omits to provide for appointments to them, or provides in an unconstitutional way for such appointments, the officers are, within the meaning of the Constitution, "officers of the United States whose appointments are not" therein "otherwise provided for." The power of appointing such officers devolves on the President. Assistant assessors, under the views here expressed, are within that class. The provision in the act of 1865, touching those officers, being null and void, and the act of 1864, to the extent just mentioned, being repealed, there is, in effect, no existing legislation which confers on any public authority the power of appointing those officers. The constitutional power of the President is in this emergency called into exercise. He alone has authority to commission the assistant assessors.

III. The third and last question on which you have desired an expression of my opinion is, whether it is the duty of the President to exercise the power of appointment in the case of these officers, in view of the express provision of the act of 1865, distinctly declaring the will of Congress that he should not appoint them, and directly against that ex-

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**Appointment of Assistant Assessors of Internal Revenue.**

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pression of the will of the legislature, and especially before any judicial determination has been had of the first two questions to which I have directed my attention?

If the President should be of opinion, on the foregoing reasoning, that he possesses the power constitutionally to make appointments to the office of assistant assessor, I think it is clearly his duty to exercise that power. The question of his constitutional authority in the case presented depends upon the view that the President may take of the unconstitutionality of the existing legislation on the subject of that office. If he fully concur in the view I have taken of the question, there is no escape from the conclusion that he alone can lawfully fill the office. It is his duty to do all that he has lawful power to do, when the occasion requires an exercise of his authority. To do less on such an occasion would be *pro tanto* to abdicate his high office.

The Constitution is the supreme law—a law superior and paramount to every other. If any law be repugnant to the Constitution, it is void; in other words, it is no law. It is the peculiar province and duty of the judicial department to say what the law is in particular cases. But before such cases arise, and in the absence of authoritative exposition of the law by that department, it is equally the duty of the officer holding the executive power of the Government to determine, for the purposes of his own conduct and action, as well the operation of conflicting laws as the constitutionality of any one. (*Marbury vs. Madison*, 1 Cranch, 180.)\*

It will be observed, let me remark, in conclusion, that the action of the President, in appointing to the office in question, will not preclude or affect judicial inquiry and decision on the points that have been presented. If two persons should claim the authority of exercising, in any

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\* The passage in the opinion of Chief Justice Marshall, which the Attorney General had in his mind is, probably, the last paragraph, in which the chief justice says:

“A law repugnant to the Constitution is void, and courts, as well as other departments, are bound by that instrument.”—ED.

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Murder of the President.

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assessment district, the office of assistant assessor, one by appointment of the President, and the other by appointment of the assessor, the question would be then peculiarly one for judicial determination, whether either, and which, of such persons was entitled to exercise the office? But I apprehend that practically no such contestation will arise. I understand that heretofore the assessors have virtually exercised the power of appointing their assistants, and it is not improbable that the President, if he commissions the officers, will adopt substantially the same course as that pursued under the act of 1864 by the Secretary of the Treasury.

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

Hon. HUGH McCULLOCH,

*Secretary of the Treasury.*

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## MURDER OF THE PRESIDENT.

Trial of the alleged murderers

ATTORNEY GENERAL'S OFFICE,

*April 28, 1865.*

SIR: I am of the opinion that the persons charged with the murder of the President of the United States can be rightfully tried by a military court.

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

The PRESIDENT.

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Payment of Checks of Army Paymasters.

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## PAYMENT OF CHECKS OF ARMY PAYMASTERS.

Checks given by paymasters are valid obligations of the Government, although dishonored for want of funds to the credit of the officers who issued them.

ATTORNEY GENERAL'S OFFICE,  
April 22, 1865.

SIR: I have the honor to give you my opinion, as requested, on the point recently submitted to me, whether checks given by paymasters are valid against the Government, so as to require payment to the holders by the Government, if the checks be dishonored for want of funds to the credit of the paymasters to meet them?

This question you referred to me in connection with a letter on "the subject of outstanding checks or drafts of paymasters," addressed to you by the Paymaster General, wherein are stated the circumstances under which the said checks were given or issued by those officers; and I assume, therefore, that you desire me to consider the question of the liability of the Government upon those instruments, under the facts presented to you by the Paymaster General.

I understand, then, that certain checks, drawn upon authorized public depositaries, were issued by United States paymasters in favor of parties—officers, soldiers, or other persons—entitled to be paid the amounts expressed in such checks; and that such checks, when presented by *bona fide* holders of the same to the proper depositaries on whom they were thus drawn for payment, were dishonored for want of funds to the credit of the paymasters. On this state of facts, the question arises whether the United States are legally bound to pay to the holders thereof the amounts of such checks or drafts? It appears very plain to me that this question must be answered in the affirmative.

In the first place, the authority of the paymasters to

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issue the checks seems to be clear under the 1st section of the act of March 3, 1857, amendatory of the act of August 6, 1846, which requires every disbursing officer or agent of the United States to deposit money intrusted to him for disbursement with the Treasurer of the United States, or with some one of the assistant treasurers, or public depositaries, and to draw for the same only in favor of the persons to whom payment is to be made in pursuance of law and instruction. The obligation created by checks issued in pursuance of this enactment, is, therefore, a public, and not a private obligation. The doctrine has been made the basis of repeated adjudications in the Supreme Court, that "where a public agent acts in the line of his duty, and by legal authority, his contracts made on account of the Government are public, not personal." (*Hodgson vs. Dexter*, 1 Cranch, 363; *Jones vs. L. Tombe*, 3 Dall., 384; *Parks vs. Rose*, 11 Howard, 374.)

The United States being thus responsible, legally, as drawers of the checks in question, the next inquiry would be, what engagements do those instruments in law import? Mr. Justice Story, in his opinion "in the matter of Brown," (2 Story R., 516,) answers that question thus: "In the case of a check, I take it to be clear that the drawer, impliedly, engages that at the time when the check is due and payable, he has, and will have then, and at all times thereafter, sufficient funds in the bank to pay the same on presentment, and by the draft he appropriates those funds absolutely for the use of the holder." A corollary from this proposition is, as explained by the same learned justice, both in that opinion and in his treatise on Promissory Notes, that if the drawer, at the date of the check, or at the time of the presentment of it for payment, had no funds in the bank, or banker's hands, or if, after drawing the check, and before its presentment for payment and dishonor, he withdrew his funds, his liability is fixed, notwithstanding any lapse of time between the issuing and presentment of the instrument, and although due notice, required in other cases of dishonor, was not given by the



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holder. "The reason is," I cite the language of Mr. Justice Story, "that if he drew the check without having any funds, he had no right to expect payment of the check, and his conduct amounted to a fraud and imposition upon the payee; and he could suffer no loss or damage on account of the dishonor, or, at least, none which might not properly be attributed to his own fault. And if he originally had funds, and had since withdrawn them from the bank or bankers, he was guilty of a manifest wrong in thus subtracting the very funds already appropriated to the payment of the check." (Story on Promissory Notes, § 498.) The Government, under these very familiar principles of mercantile law, treating them as applicable to the instruments in question, cannot, in the cases of any of these checks, complain of the want of due presentment or of the want of due notice. It is fixed, without regard to any point of presentment or notice, with an absolute responsibility to pay the checks on dishonor.

There is a simpler view, however, that may be taken of the case. The checks are, in effect, drawn by the Government upon the Government. The drawee, the public depositary, was made the agent of the Government to effect the payment of the party who holds the obligation. That he did not pay the party was owing to the neglect or default of another agent of the Government, the drawer, whose duty it was to see that he had the means of making the payment.

If the United States can escape from the liability of paying the check, it must escape on the principle that the inability of one of their agents to perform his duty, in effecting payment of a debt of the Government, in consequence of the neglect or default of another officer in doing *his* appropriate duty, discharges the Government from its original obligation to its creditor. On that principle, if the Paymaster General should neglect or refuse to place adequate funds to the credit of the proper paymasters, or, after so doing, should withdraw the funds, the United States would be released from obligation to pay their

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Regulation of Commercial Intercourse.

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officers and soldiers. The doctrine certainly is not a sound one.

I am, sir, very respectfully,  
Your obedient servant,

JAMES SPEED.

Hon. EDWIN M. STANTON,  
*Secretary of War.*

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REGULATION OF COMMERCIAL INTERCOURSE.

Powers of the President in reference to the regulation of commercial intercourse and relations, under the statutes of July 13, 1861, and July 2, 1864.

ATTORNEY GENERAL'S OFFICE,  
*May 5, 1865.*

SIR: By the 5th section of the act of July 13, 1861, after the President shall have declared a State, or part thereof, in insurrection against the United States, all commercial intercourse, by and between the same and the citizens thereof and the citizens of the rest of the United States, shall cease, and be unlawful, so long as such condition of hostilities shall continue, provided, however, that the President may, in his discretion, license and permit commercial intercourse in such articles, for such time, and by such persons, as he may think fit and most conducive to the public interest; and such intercourse, so far as by him licensed, shall be conducted and carried on in pursuance to rules and regulations prescribed by the Secretary of the Treasury.

This section confers upon the President, and the President only, the sole power to permit commercial intercourse betwixt the citizens of districts proclaimed to be in insurrection and the citizens of the rest of the United States. The section does not give to the President any power or control over the trade and commerce betwixt the citizens in the districts declared to be in insurrection. Commerce betwixt the loyal and disloyal districts is denounced,

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and pronounced unlawful, except when licensed by the President.

Such being the power of the President, Congress passed the act of July 2, 1864.

By the 4th section of that act, the prohibitions and provisions of the act of July 13, 1861, are made to apply to all commercial intercourse by and between persons residing or being within districts declared in insurrection. Thus was given power to the President to license trade and commerce between persons residing and being within the district declared to be in insurrection. This section gives to the President larger powers than he had under the act of July, 1861.

By the 8th section it is enacted, that it may be lawful for the Secretary of the Treasury, with the approval of the President, to purchase the products of the States declared to be in insurrection. It would seem plain, from the language of this section, that it is within the discretion of the President to withhold his approval of such purchases, thus keeping in the hands of the President complete control over the subject of trade between the loyal and disloyal, and of the disloyal amongst themselves.

Then follows the 9th section, the true construction of which is difficult.

Before quoting the language of that section, let it be borne in mind that the 5th section of the act of July 13, 1861, denounced and prohibited commercial intercourse between the citizens of the insurrectionary districts and the citizens of the rest of the United States; and that, by the 4th section of the act of July 2, 1864, commercial intercourse between citizens of the insurrectionary districts is declared unlawful, and the President is authorized by license to control and regulate both.

The 9th section repeals so much of the 5th section of the act of July 13, 1861, as authorizes the President, in his discretion, to license or permit commercial relations in any State or section, the inhabitants of which are declared in a state of insurrection.

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It will be perceived, that in this section the word *relations* is used, and not intercourse; and, further, that the language is, *in any State* or section, the inhabitants of which are declared in a state of insurrection. Now, the act of July 13, 1861, as has been before stated, does not give authority to the President to permit or license intercourse or relations in any State or section, the inhabitants of which are declared to be in insurrection. The authority, under the act of July, 1861, was to license and permit commercial intercourse between the loyal and the disloyal parts of the United States. If we understand and give effect literally to the language of the 9th section, so far as quoted, it does nothing. Taken literally, it imports that the President was vested with an authority, by the 5th section of the act of July, 1861, that was not conferred thereby, but, in truth, the 4th section of the act of July, 1864, confers upon the President the very power which is attributed to him by the 9th section of the same act, as flowing from the act of July 13, 1861. The literal effect of the words of the 9th section would repeal the 4th section of the same act. Such cannot have been the intention of Congress. If possible, some effect must be given to the section; it must not be construed to be an idle and nugatory clause, if we can get at the intention of the legislature. The preposition "in" makes the trouble. If *with* had been used, there would be none. Then the sentence would read, "with any State or section," &c. That the sentence must be construed as taking away from the President much of the authority to license and permit commercial intercourse, between the loyal and disloyal districts, can hardly admit of a doubt, when the provisions of the 5th section of the act of July, 1861, the 4th section of the act of July, 1864, and the whole language of the 9th section of July, 1864, are read and considered together.

Next is to be seen how much discretion to license and permit commercial intercourse remains with the President. Under the existing state of things, it is important that this

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discretion should be large, so as to bring trade to as near the point of untrammelled freedom as is consistent with public safety.

Under the 9th section, the President can admit as much commerce betwixt the loyal and disloyal districts "as may be necessary to authorize supplying the necessities of loyal persons residing in insurrectionary States." Thus, two duties are devolved upon the President. First, to say what are necessities, and, second, to fix the rule by which loyalty, so far as the purchase of necessities is concerned, is to be determined. The exercise of these powers is in his discretion. That discretion can, as the State or district manifests a rebellious temper or a loyal spirit, be sparingly or liberally used. The authority to permit trade beyond the federal military lines is absolutely taken away from the President.

The President can also permit persons residing within such lines to bring, or send to market in the loyal States, any products which they shall have produced, with their *own labor or the labor of freedmen, and others employed and paid by them*. By this sentence, there is an absolute prohibition against bringing to market in the loyal States the products of *slave labor*. The prohibition results directly from the fact, that none are admitted to be sent or brought except the products of free labor. The President must prescribe the rule by which the products of free labor are to be known from those of slave labor. The market for the products of free labor can be made as free as the President may in his discretion elect to make it.

After the President has decided what may be regarded as necessities in a particular military department, the commanding general thereof, and an officer designated by the Secretary of the Treasury for that purpose, shall say in what monthly amounts goods, wares, and merchandise may be carried into the department, and to and from what places. It seems to me, that the duty of saying in what monthly amounts, and to and from what places, goods are to be taken into disloyal districts, is attached to the office

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**Bounties to Troops Mustered out of Service.**

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of the commanding general of a department and the officer designated by the Secretary of the Treasury.

Under this power or discretion, the trade can be left as free, or made as limited, as the President may deem expedient for the public good and safety.

This whole trade must be conducted under rules relating thereto, made by the Secretary of the Treasury, with the approval of the President. As it is greatly desired that the intercourse should be as free as possible, there need be but few rules, and they as simple as possible. But under my view of the statute, there can be no trade betwixt the loyal States and disloyal districts, now in the military occupation of the United States forces, except according to the rules required to be prescribed.

This statute, unfortunately, seems to have been framed in reference to a state of actual and active hostility. But it is the law, and we must conform to its provisions until it is repealed, or it shall be proclaimed that the rebellion has been suppressed. The necessities of the southern people, and an exhibition of returning loyalty, should make us construe it as much for their advantage as we possibly can.

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

The PRESIDENT.

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**BOUNTIES TO TROOPS MUSTERED OUT OF SERVICE.**

1. The regulations of the War Department, in reference to the payment of bounties to veterans mustered out of service before the expiration of their term of enlistment, by reason of their service being no longer required, have the force of law, by effect of joint resolutions of January 13, 1864, and March 3, 1864.
2. A volunteer mustered into service under act of July 4, 1864, is entitled, if mustered out for the above reason, before the expiration of his period of service, to receive only the proportion of the bounty allowed by the act which had actually accrued before the date of his discharge.

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Bounties to Troops Mustered out of Service.

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8. Commissioned officers of volunteers, below the rank of brigadier general, mustered out because their services are no longer required, are entitled to receive "three months' pay proper," under the 4th section of act of March 3, 1865. (13 Stats., 497.)

ATTORNEY GENERAL'S OFFICE,

*May 6, 1864.*

SIR: I have considered the several questions presented by the Paymaster General and the Adjutant General of the army, in their respective communications of May 3, and May 4, instant, relative to the amounts of bounty payable to the soldiers of certain military organizations now being mustered out of service, and also the point suggested in those communications, relative to the proper construction of 4th section of the army appropriation act of March 3, 1865, (13 Stats., 497,) concerning the allowance of extra pay (as it may be called) to certain volunteer officers continuing in the service "to the close of the war."

The first question is, whether veterans who re-entered and persons who enlisted in the regular or volunteer forces of the United States for three years, or during the war, under the regulations and orders referred to in the communication of the Paymaster General, issued by the Secretary of War, and by the provost marshal general, with the approval of the Secretary, and who may be honorably mustered out of the service, by reason of the Government no longer requiring their services, before the expiration of the term of enlistment, are respectively entitled, on being so mustered out, to the unpaid balance of the bounties promised to them by the orders under which they were enlisted? I am of opinion that they are so entitled by the operation of the joint resolutions of Congress, approved respectively January 13, 1864, and March 3, 1864, which give the force and effect of law to the regulations and orders of the War Department just referred to, providing for the payment of bounties to the classes of soldiers above named. These regulations and orders, in terms, promise and declare, that "if the Government shall not require these troops for the full period of three years, and

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**Bounties to Troops Mustered out of Service.**

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they shall be mustered honorably out of the service before the expiration of their term of enlistment, they shall receive upon being mustered out the whole amount of bounty remaining unpaid the same as if the whole term had been served."

The second question relates to soldiers who entered the service pursuant to and under the provisions of the act of July 4, 1864, promulgated by the War Department in General Orders No. 224, and it is, whether they are respectively entitled to receive on being thus mustered out of the service before the expiration of their respective terms of enlistment, the whole amounts of bounty to which they would have been entitled if they had continued in the service throughout their respective periods of enlistment, or only those proportions or instalments of the several bounties which may have actually accrued to them at the dates of their respective discharges?

I am of opinion that a volunteer accepted and mustered into the service under the statute of July 4, 1864, whether for a term of one year, or of two years, or of three years, if he is mustered out of the service for the reason mentioned before the expiration of the term of service for which he enlisted, is entitled only to receive the proportion of the bounty allowed him by the statute, whether one-third or two-thirds thereof, which had actually accrued before the date of his discharge. If, for instance, he volunteered for two years, and is mustered out before the expiration of his first year of service, he cannot claim either the second or the third instalment of the bounty of two hundred dollars, which would have been payable to him had he continued in the service till the expiration of the two years for which he enlisted. The volunteer only who at the time of his discharge has completed one half of the term of service for which he enlisted, is entitled to the second instalment of one third of the amount of bounty given to him by the act; and he is entitled to no more of that bounty. If he is discharged on the next day after the expiration of one half of his term of enlistment, the second instalment



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Bounties to Troops Mustered out of Service.

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of the bounty is due and payable to him. The Government cannot reclaim it if it has been paid; nor withhold it if it remain unpaid. But the discharge precludes him from receiving the third instalment. That only is due to a volunteer who may have served through the whole term for which he enlisted.

I confess that there is some obscurity in the act, and that there is a little difficulty in determining its meaning; but, on the whole, I am of opinion that the Paymaster General has arrived at the true construction of the statute.

The third question is, whether commissioned officers of volunteers below the rank of brigadier general whom the Government may muster out of service, because their services are no longer required, are entitled respectively to receive, on leaving the service, "three months' pay proper," under the provision of the 4th section of the act of March, 1865?

The right of these officers to receive that allowance depends upon the determination of the point, whether they have continued in the service "to the close of the war," within the meaning of the statute of 1865. I am of opinion if such an officer continue in the army till he is honorably mustered out, because his military services are no longer needed, and till the Government thus declares that it no longer requires him to perform any duty on its behalf under his commission, that he is within the provision of the statute, and in its contemplation he has continued in the military service "to the close of the war." The war, so far as he is concerned in his capacity as an officer, has closed. He has performed his duty, his entire duty, to the Government and the cause for which he drew his sword. When his country, by its appropriate organ, commands him to return his sword to the scabbard, and retires him honorably from its service, I know not how we can, with respect to that officer, say that the war has not closed.

I am of opinion that an officer of the class named

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PARDONING POWER.

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in the statute now and thus mustered out of service is entitled to receive "three months' pay proper."

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

Hon. EDWIN M. STANTON,

*Secretary of War.*

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## PARDONING POWER.

Commentary on the constitutional power of the President "to grant reprieves and pardons for offences against the United States, except in cases of impeachment."

ATTORNEY GENERAL'S OFFICE,

*May 8, 1865.*

SIR: I have the honor to acknowledge the receipt of your letter of April 21, 1865.

By the Constitution of the United States, (2d Art., § 2, cl. 1,) the President is vested with the "power to grant reprieves and pardons for offences against the United States, except in case of impeachment."

By the 13th section of the act of Congress, entitled "An act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes," approved July 17, 1862, "the President is authorized, at any time hereafter, by proclamation, to extend to persons who may have participated in the existing rebellion, in any State or part thereof, pardon and amnesty, with such exceptions, and at such time, and on such conditions, as he may deem expedient for the public welfare."

The right and power of the President to pardon and to issue any proclamation of amnesty are derived from the clauses in the Constitution and the act of Congress as quoted above.

By the Constitution and the act of Congress, the power to pardon in individual cases and the power of extending by proclamation amnesty to classes of individuals are

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solely in the hands of the President. It is, therefore, needless to discuss the question whether the act of Congress was necessary in order to enable the President lawfully to issue a proclamation of pardon and amnesty. The power of exercising and extending mercy resides in some department of every well ordered government. When order and peace reign, its exercise is frequent and its influence valuable.

Its influence is of value inestimable at the termination of an insurrection so wide-spread as the one which in our country is just being suppressed. Its appropriate office is to soothe and heal, not to keep alive or to initiate the rebellious and malignant passions that induced, precipitated, and sustained the insurrection. This power to soothe and heal is appropriately vested in the executive department of the Government, whose duty it is to recognize and declare the existence of an insurrection, to suppress it by force, and to proclaim its suppression. In order, then, that this benign power of the Government should accomplish the objects for which it was given, the extent and limits of the power should be clearly understood. Therefore, before proceeding to answer the questions propounded in your letter, it would seem to be eminently proper to state some of the obvious principles upon which the power to grant pardons and amnesty rests, and deduce from those principles the limitation of that power.

The words amnesty and pardon have a usual and well understood meaning. Neither is defined in any act of Congress. The latter is not used in the Constitution. A pardon is a remission of guilt. An amnesty is an act of oblivion or forgetfulness. They are acts of sovereign mercy and grace flowing from the appropriate organ of the Government.

There can be no pardon where there is no actual or imputed guilt. The acceptance of a pardon is a confession of guilt, or of the existence of a state of facts from which a judgment of guilt would follow.

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A pardon may be absolute and complete, or it may be conditional or partial. The whole penalty denounced by the law against an offender may be forgiven, or so much of it only as may seem expedient. The power to pardon is not exhausted by its partial use. A part of the penalty may be forgiven now, and at a future time another part, and so on till the whole is forgiven. This power may be so used as to place the offender upon trial and probation as to his good faith and purposes.

A pardon may be upon conditions, and those conditions may be precedent or subsequent. The conditions, however, appended to a pardon cannot be immoral, illegal, or inconsistent with the pardon.

If a condition precedent annexed to a pardon be immoral so that the person in whose favor it is issued should never speak the truth; or illegal, so that he should commit murder; or inconsistent with the pardon, so that he should never eat or sleep, the pardon would never attach or be of avail. On the other hand, if those conditions were subsequent, that is, if it were declared that the pardon should be void if the party ever spoke the truth, or if he did not commit murder, or if he should eat or sleep, the pardon would attach and be valid, and the condition void and of no effect. If a condition subsequent is broken, the offender could be tried and punished for the original offence. The breach of the condition would make the pardon void. Any conditions, precedent or subsequent, may, therefore, be appended that are not immoral, illegal, or inconsistent with the pardon. This great and sovereign power of mercy can never be used as a cover for immoral or illegal conduct.

As a pardon presupposes that an offence has been committed, and ever acts upon the past, the power to grant it never can be exerted as an immunity or license for future misdoing.

A pardon procured by fraud or for a fraudulent purpose, upon the suppression of the truth, or the suggestion of falsehood, is void. It is a deed of mercy given without

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other fee or reward than the good faith, truth, and repentance of the culprit. On the other hand, as an act of grace freely given, when obtained without falsehood, fraud, and for no fraudulent use, it should be liberally construed in favor of the repentant offender.

A promise to pardon is not a pardon, and may at any time be withdrawn. But a pardon may be offered, and the offer kept open and thus be continuing, so that the person to whom it is offered may accept it at a future day. After the pardon has been accepted, it becomes a valid act, and the person receiving it is entitled to all its benefits.

The principles hereinbefore stated forbid, however, that an offer of pardon be construed as a license or indulgence to commit continuing or future offences, or as giving immunity from the consequences of such offences. After the offender shall have received notice of the offer, or after a reasonable time shall have elapsed within which he must be presumed to have received notice of the offer, he cannot continue his ill-doing, and then accept and rely upon the offer of pardon as an indemnity against what he did before, and also what he did after notice. Such a construction of the pardoning power would virtually convert it into a power to license crime.

The high and necessary power of extending pardon and amnesty can never be rightfully exercised so as to enable the President to say to offenders against the law, "I now offer you a free pardon for the past; or at any future day when you shall, from baffled hopes, or after being foiled in dangerous and bloody enterprises, think proper to accept, I will give you a pardon for the then past."

When men have offended against the law, their appeal is for mercy, not for justice. In this country, and under this Government, violators of the law have offended against a law of their own making; out of their own mouths they are condemned—convicted by their own judgments—and, under a law of their own making, they cannot appear before the seat of mercy, and arrogantly claim the fulfillment of a promise of pardon they have refused and defied.

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The excellence of mercy and charity in a national trouble like ours, ought not to be undervalued. Such feelings should be fondly cherished and studiously cultivated. When brought into action, they should be generously but wisely indulged. Like all the great, necessary, and useful powers in nature or in government, harm may come of their improvident use, and perils which seem passed may be renewed, and other and new dangers be precipitated. By a too extended, thoughtless, or unwise kindness, the man or the government may warm into life an adder that will requite that kindness by a fatal sting from a poisonous fang.

Keeping in view these obvious and fundamental principles that fix and limit the powers of pardon and amnesty under the Constitution and the law, I will proceed to consider the questions propounded by you on the proclamations dated respectively on the 8th day of December, 1863, and on the 26th day of March, 1864, commonly called the amnesty proclamations.

You ask my opinion, first, as to the proper construction and effect of those proclamations upon the citizens and residents of rebel States, who have taken the oath of amnesty prescribed therein.

These two proclamations must be read together, and regarded as one instrument. That must at least be so from the date of the last proclamation, March 26, 1864.

No doubt many persons did, betwixt the 8th of December, 1863, and the 26th of March, 1864, take the oath, who could not have done so had the original proclamation contained the exceptions set forth in the second. What the rights are of those who took the oath in that intermediate space of time, and who could not have taken it after the 26th of March, 1864, is purely a judicial question. The facts in such cases are accomplished, and the rights arising out of those facts have attached and become vested. If not improper, it would be at least idle in me to express an opinion on those cases. The judicial department of the Government must determine the law in those cases when they are properly presented before the courts. For

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all practical purposes, so far as the executive department of the Government is concerned, both proclamations may, therefore, be regarded as of the date the 26th of March, 1864. From that point of view their proper operation and effect are now to be considered.

It is plainly stated on the face of the second proclamation, that its objects "were to suppress the insurrection, and to restore the authority of the United States, and with reference to these objects alone." In the midst of a gigantic effort on the part of traitors to dismember our country and overthrow our Government, the President, in the legitimate exercise of his great powers, invoked the healing influences of charity and forgiveness. His great heart but responded to the desire of the American people to win back this misguided people to their allegiance, and to peace and order, by gentleness, rather than to compel obedience by the dread powers of war. It must not be supposed, that in giving expression to, and making a law of, this noble wish of his heart, and the heart of the people whom he represented, it was intended to give license and immunity to crime and treason for the then future. His expressed object was "to suppress the insurrection, and to restore the authority of the United States, and that alone." This object was made still more manifest when he said that the person "shall voluntarily come forward" and take the said oath, with the purpose of restoring peace and establishing the national authority.

The reluctant, unrepentant, defying persons, who in their hearts desired the success of the rebellion and the overthrow of the Government, were not invited to take the oath; and if any such should take it, they would but add perjury, a God-defying sin, to that of treason; and if that fact can be shown to a judicial tribunal, it seems to me that they should take no benefit from the pardon and amnesty. A mind and heart unpurged of treason were not invited by the amnesty proclamation to add thereto the crime of perjury.

It seems to me, then, that all the citizens and residents

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of the rebel States, not excepted from the amnesty, who did, after the issuing of the proclamation, or after notice thereof, or within a reasonable time, within which it must be supposed they had notice, refrain from further hostilities and take the oath of amnesty voluntarily, with the purpose of restoring peace and establishing the national authority—being at the time free from arrest, confinement, or duress, and not under bonds—are entitled to all the benefits and rights so freely and benignly given by a magnanimous Government. Where the oath has been taken without the purpose of restoring peace and establishing the national authority, though taken promptly, it seems to me that the amnesty and pardon do not attach. This, however, is a judicial question, which the courts may decide contrary to my opinion. I ought not, perhaps, to express any.

In giving this construction to the amnesty proclamation, I have been constantly impressed by a paragraph in the last annual message of the President of the United States. It reads as follows:

“A year ago, general pardon and amnesty, upon specified terms, were offered to all, except certain designated classes; and it was, at the same time, made known that the exempted classes were still within contemplation of special clemency. During the year many availed themselves of the general provision, and many more would, only that the signs of bad faith in some, led to such precautionary measures, as rendered the practical process less easy and certain. During the same time also, special pardons have been granted to individuals of the excepted classes, and no voluntary application has been denied. Thus, practically, the door has been, for a full year, open to all, except such as were not in condition to make a free choice, that is, such as were in custody or under constraint. It is still open to all. But the time may come, probably will come, when public duty shall demand that it be closed, and that, in lieu, more rigorous measures than heretofore shall be adopted.”



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A profound respect for the opinions of that great and good man, Abraham Lincoln, late President of the United States, induces me to ponder long and well before I can venture to express an opinion differing even in a shade from his. But all who had the good fortune to know him well must feel and know that from his very nature he was not only tempted but forced to strain his power of mercy. His love for mankind was boundless, his charity was all-embracing, and his benevolence so sensitive that he sometimes was as ready to pardon the unrepentant as the sincerely penitent offender. Clearly and pointedly does the above paragraph show to the world that such was his nature. He says, during the whole year that special pardons have been granted to individuals of the excepted classes, no voluntary application has been denied. The door of mercy to his heart was, we know, ever open, and yet he closes the paragraph with this significant sentence, "But the time may come, probably will come, when public duty shall demand that it be closed; and that in lieu, more rigorous measures than heretofore shall be adopted."

It is probably fair to infer that the late President understood his proclamation of amnesty as giving pardon to all, no matter how long they had refused and whether they had offended after notice of the offer or not. Whether his powers extended so far, is, to say the least, a doubtful question.

I am clear and decided in my conviction that the President has no power to make an open offer of pardon which could be relied upon as a protection for offences committed after notice of the offer. This opinion is induced from principle, and independently of the language of the proclamation. The language of the first proclamation is, however, consonant with this opinion. It is addressed "to all persons who have participated in the existing rebellion," words referring to the past.

If I am right in this construction of the proclamation, and I am satisfied in my own mind that I am, another proclamation should be issued. Persons should not be invited

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to take an oath, and to comply with terms, under which they cannot obtain firm, legal rights. It is especially due to those who have heretofore, and would now, avail themselves, in good faith, of the benefits of pardon and amnesty, that another proclamation should be substituted, covering the now past. Persons who have been constantly engaged in rebellion should know distinctly what they are to do, when and how they are to do it, to free themselves from punishment, in whole or in part, or to reinstate themselves as before the rebellion. Such as have been affected merely by their treasonable associations should be absolutely forgiven; appropriate conditions should be appended to the pardons of many. The grace and favor of the Government should now be large and generous, and the operation and effect of its proper mercy should not be left uncertain.

The second question you ask is, as to the rights of the citizens and residents of the rebel States who have not taken, or offered to take, the oath, and comply with the terms of the proclamation.

Here, again, we meet trouble and uncertainty. The expressed objects of the proclamation are, to suppress the insurrection and restore the authority of the United States. Can any one be permitted to take the oath and comply with the terms prescribed in the proclamation in a State or community where the civil and military power of the insurrection has been destroyed and the rebellion suppressed, and the authority of the United States is established without let or hindrance; or does the insurrection continue in legal contemplation, though not in fact, until the executive department of the Government shall, by proclamation, declare that it has been suppressed? and would this proclamation of pardon and amnesty continue and be open after proclamation that the rebellion had been suppressed? It would seem from the proclamation that the amnesty was extended to those who were willing to aid in suppressing as well as restoring, and yet it may, and doubtless will be, contended, and with much force and show of reason, that all who have stood by and clung to the in-

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surrection till its organization and power, both civil and military, were gone, have, nevertheless, a right to take all the benefits of the amnesty, because they will lend a reluctant aid in restoring an authority which they hate. Amnesty is proffered for aid in suppressing and restoring; amnesty is demanded for the work of restoration; full reward is required for less than half the service that is needed.

As a measure to aid in the suppression of the rebellion, the late proclamation has done its full and complete office. Now one is desired to aid in restoring order and reorganizing society in the rebellious States. Reconstruction is not needed. That word conveys an erroneous idea. The construction of this Government is as perfect as human wisdom can make it. The trial to which its powers and capacities have been subjected in this effort at revolution and dismemberment proves with what wisdom its foundations have been laid. Ours is a task to preserve principles and powers clearly and well defined, and that have carried us safely through our past troubles. Ours is not a duty to reconstruct or change. Society in the rebel States has not been, and is not now, in a normal condition, nor in harmony with the principles of our Government. That society has rebelled against them and made war upon the principles and powers of our Government. In so doing, it has offended, and stands a convicted culprit. Mercy must be largely extended. Some of the great leaders and defenders only must be made to feel the extreme rigor of the law; not in a spirit of revenge but to put the seal of infamy upon their conduct. But the mercy extended to the great mass of the misguided people can and should be so used as to reorganize society upon a loyal and freedom-loving basis. It is manifestly for their good and the good of mankind that this should be done. The power of pardon and mercy is adequate to this end. Such conditions, precedent and subsequent, can legally and properly be appended, as will root out the spirit of rebellion, and bring society in those States into perfect accord with the wise and thoroughly tried principle of our Gov-

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**Deposit of Ships' Papers with American Consuls.**

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ernment. If this power of pardon is wisely used, peace will be established upon a sure and permanent basis.

On these grounds, in addition to what has before been said, I am of the opinion that another and a new offer of amnesty, adapted to the existing condition of things, should be proclaimed.

I do not conceive that it is in place just now, even if I were prepared to do so, which I am not, because not sufficiently advised of the temper of those in rebellion, for me to say what should be the terms of the suggested proclamation.

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

The PRESIDENT.

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**DEPOSIT OF SHIPS' PAPERS WITH AMERICAN CONSULS.**

The provisions of the act of February 28, 1803, in reference to the deposit of ships' papers with American consuls, apply to American steam ferry-boats running between Detroit and Windsor, Canada West.

ATTORNEY GENERAL'S OFFICE,

*May 12, 1865.*

SIR: I am in receipt of your letter of 28th ultimo, submitting for my opinion two questions relative to the duty of the masters of certain American steam ferry-boats running between Detroit and Windsor, Canada West, to deposit their vessels' papers with the consul of our Government at the latter port, and to pay the tonnage fees provided by law.

These questions are stated in the despatch of our consul at Windsor to the Secretary of State, dated 20th ultimo.

The act of February 28, 1803, (2 Stats., 203,) provides "that it shall be the duty of every master or commander of a ship or vessel belonging to citizens of the United

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Deposit of Ships' Papers with American Consuls.

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States, on his arrival at a foreign port, to deposit his register, &c., with the consul, &c., if any there be at such port."

If in the case of the vessels named, the only substantial question on which the consul has difficulty or doubt be, whether ports in the British North American provinces are, within the meaning of this act, "foreign" ports, I have no difficulty in advising that they are, and that every American vessel, on her "arrival" at one of those ports is obliged by the law to deposit her papers with the consul or commercial agent of our Government there.

I know of no statute taking vessels arriving at ports in Canada, and in the other British provinces in America, from out of the provision of the act of 1803.

The vessels to which reference is made by the consul in his despatch must therefore deposit their papers with him, on the occasion of each arrival at Windsor. The question, what is an "arrival," within the meaning of the act of Congress, has been the subject of frequent consideration in this office and in the courts. If a vessel make an entry, or is required by law or usage at the foreign port to make an entry, on coming to port, I am of opinion that her coming there amounts to an "arrival," within the meaning of the statute.

Specifically replying, then, to the second question of the consul, I think that all American vessels entering Windsor are obliged by law to deposit their papers in the consulate there, be their stay there ever so short.

Cases may occur, where vessels, on coming to foreign ports neither make entries, nor are obliged by the law or usage there to enter, in which the requirement of the law would, nevertheless, attach. If their voyages end at the foreign ports, I think their coming is on each occasion an arrival, whether they are required by the law of the foreign ports to enter and clear or not. The case presented by the consul in his first inquiry would seem to be one of this kind; and even if a formal entry and clearance by the

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Deposit of Ships' Papers with American Consuls.

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vessels he refers to, on coming and leaving Windsor, is not required of them by the law or usage prevailing there, I should be of opinion that they are, nevertheless, liable to deposit their papers, and pay tonnage fees.

But the act of August 5, 1861, (12 Stats., 315) does not allow consuls to receive from vessels running regularly by weekly or monthly trips to or between foreign ports fees for more than four trips in a year. This act is not to be construed, however, in my opinion, as affecting in any way the duty of the master with regard to depositing his papers, under the statute of 1803. The fees are not collectable by the consul for more than four trips in each year, but at each arrival the master must still deposit his papers.

I send, for the information of the consul, a fuller opinion in the case of certain vessels touching at Sarnia, on the foregoing question, by my learned predecessor, Mr. Bates, in the doctrine of which I concur.

I should think, let me observe, in conclusion, that it would be highly expedient at this time, in view of the relation of Canada and the other British provinces to this country, as a place of refuge and escape sought for and reached by many dangerous persons from the insurrectionary States, for the department to require that our consuls and commercial agents at the British North American ports enforce compliance strictly and rigidly with the provisions of the act of 1803, in cases to which they are legally applicable.

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

Hon. WM. W. HUNTER,

*Acting Secretary of State.*

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Arrest of Paroled Rebels by State Process.

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## ARREST OF PAROLED REBELS BY STATE PROCESS.

The Government of the United States should not interfere with process, issued out of a State court in Kentucky for the arrest of "paroled rebel prisoners," charged with robbery on the occasion of "Morgan's raid."

ATTORNEY GENERAL'S OFFICE,

May 27, 1865.

SIR: I have received and considered the letter of Hon. W. C. Goodloe, of Kentucky, to you, transmitted to me, under cover of your communication of 20th instant.

I am of opinion that there is no legal duty imposed upon the Government of the United States to prevent or interfere with the execution of process issued out of a State court in Kentucky for the arrest of persons who may be "paroled rebel prisoners," charged and indicted in such court with robbery, committed within its jurisdiction, on the occasion of what is described as "Morgan's raid," and, therefore, that the Government of the United States ought not to prevent or interfere with the execution of such process.

Whether such persons are guilty of robbery, and whether they have any adequate legal defence to such a charge, are questions for the judicial determination of the court before whom they may be tried. The jurisdiction of the court to decide those questions, after the parties are arrested, is unquestionable, and the Government of the United States should not interfere to take the cases in question out of, or place them beyond the cognizance of the State tribunal.

I return herewith the letters of Judge Goodloe.

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

Hon. EDWIN M. STANTON,

*Secretary of War.*

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Mitchell's Claim.

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## MITCHELL'S CLAIM.

The appropriations made by the acts of April 16, 1862, and July 16, 1862, for the purpose of facilitating the colonization of persons of African descent, cannot be used to pay the salary of the "Commissioner of Colonization," for services rendered after the passage of the act of July 2, 1864.

## ATTORNEY GENERAL'S OFFICE,

*June 2, 1865.*

SIR: You ask my opinion on two questions, as follows:

1st. Is Mr. Mitchell entitled to his salary from July 2, 1864, at the rate fixed by the order of the Secretary of the Interior of December 1, 1862?

2d. Are the appropriations made by the act of April 16, 1862, and the act of July 16, 1862, applicable to the payment of such salary?

I prefer, for reasons presently to be stated, to consider these questions in the inverse order—to determine whether the moneys appropriated by the statutes of April 16 and July 16, 1862, are available for the payment of Mr. Mitchell's claim, before considering the point you first present, whether he is entitled in law to receive anything from the United States. In the first place, who is Mr. Mitchell, and how does his claim with respect to the salary in question arise?

He is styled in the order of the Secretary of the Interior, fixing his compensation, a "commissioner of colonization." But the document which is the evidence of the authority he received from the President, denominates him an "agent to aid in the execution of the several laws and parts of laws enacted and approved, during the second session of the Thirty-Seventh Congress, which provide for the migration or colonization of persons of African descent." Whatever is or was his proper designation, we see in the President's memorandum of his appointment, what duties were intended to be imposed upon him, and what functions it was designed he should exercise. He was appointed simply an "agent" to aid in the execution



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Mitchell's Claim.

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of certain statutes. And what were the provisions of those statutes?

The first of them (act of April 16, 1862, sec. 11, 12 Stat. at Large, 878,) appropriated the sum of one hundred thousand dollars, to be expended under the direction of the President, to aid in the colonization and settlement of such of the freed and free colored persons of the District of Columbia, as might desire to emigrate beyond the limits of the United States. The second statute (act of July 16, 1862, *ibid*, 582,) appropriated an additional sum of five hundred thousand dollars to enable the President to colonize and settle the persons before mentioned, and, also, "to colonize those to be made free by the probable passage of a confiscation bill." The "confiscation bill" here mentioned was passed, and in its 12th section authorized the President to make provision for the transportation, colonization and settlement, in some tropical country beyond the limits of the United States, of such persons of the African race, made free by the act, as might be willing to emigrate. (Act July 17, 1862, *ibid*, 592.) This was the third and last statutory provision on the subject of the migration and colonization, under the auspices of the Federal Government, of persons of African descent, passed during the second session of the Thirty-Seventh Congress. It was under the power and in pursuance of the authority conferred upon the President by these enactments, that he constituted the agency conferred on Mr. Mitchell. Mr. Mitchell having on the 4th of August, 1862, received his appointment, the President, on the 12th of September, 1862, charged the Department of the Interior with the execution, under the direction of the President, of the 11th section of the act of April 16, 1862, and the provision of the act of July 16, 1862, which I have just cited; and pursuant, it must be supposed, to the authority conferred on his Department by the President, the Secretary of the Interior, on the 1st of December, 1862, directed that the compensation of Mr. Mitchell be that of a fourth class clerk, eighteen hundred dollars per year, and that this

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salary should be paid "from the appropriation for colonization, to date from the date of his commission."

Thus far the case presents no difficulty. We have the employment by the President, under his lawful authority, the determination of the compensation of the agent by the Department to whom the President committed (subject to his direction) the execution of the laws under which the agency was created, and the designation of the appropriation lawfully available to meet the expenditure. So long as the employment subsisted, and the appropriation in question remained subject to the order of the President, the Department had clear authority to pay him for his services.

But, on the 2d of July, 1864, Congress passed an act which placed *all* moneys, which had been previously appropriated, for the purposes of facilitating the migration or colonization of the persons before referred to, beyond the control of the President, except in so far as such money might be needed to meet any expenditure incurred by carrying into effect the statutory provision before mentioned, on the subject of migration or colonization, and, also, to meet any expenditure necessary to fulfil the existing engagements of the Government in relation thereto. I give the effect, and not the language, of the 7th section of the act of July 2, 1864. (13 Stats. at Large, 552.) Clearly, after this enactment, neither the President nor the Secretary of the Interior had any authority to employ one dollar of the public money in the treasury, for any object or purpose connected with the subject of the migration or colonization of persons of African descent, unless it was employed in the fulfilment of engagements existing at the date of the act in relation to that subject, or in payment of debts, at that date, actually accrued in execution of the legislation of Congress. If, therefore, Mr. Mitchell's claim is not embraced within one or other of these alternate exceptions, the Secretary of the Interior has possessed no power, since the passage of the act of 1864, to draw upon the appropriations made by the statutes

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of 1862 for the payment of his demand. Those appropriations expired instantly on the approval of the act of 1864, except so far as they might be needed to meet expenditures of the two kinds mentioned in the proviso to the 7th section.

Within neither one nor other class of expenditure mentioned in the proviso can the claim of Mr. Mitchell, by the utmost license of construction, be brought.

I think, indeed, it is too clear for argument, that Mr. Mitchell's demand is not within the purview of the proviso to the 7th section of the act of 1864, and, therefore, that the appropriations made by the act of April 16, 1862, and July 16, 1862, are not applicable to the payment of any salary to which he may be legally entitled, and which may be due to him since July 2, 1864. There is not now, and has not been, if I have reviewed the whole legislation on the subject, one dollar in the treasury, since the passage of the act of 1864, to pay Mr. Mitchell's demand, however well-founded in law that demand may be.

This being the case, is it desirable, either for you or me, to determine the point presented in your first inquiry? I do not think that it is. More than that, I think this is a claim which should be adjudged, if adjudged it shall ever be, by any other Department of the Government than the Executive, without, and independently of, any opinion, either for or against it, from this or from your Department. If I were entirely free from any doubt as to its legal character, and could see very clearly that Mr. Mitchell had a good demand in law against the United States, I should probably not hesitate to consider your first question, and give you my opinion upon it. He might, under those circumstances, be entitled to your favorable determination of the question, with a view to an ulterior application to Congress. But my mind not being clear, in favor of the legal validity of his claim, I deem it the more prudent course to abstain, until you shall repeat your request, from considering the legal merits of the demand in question. I am free to say, very candidly, that

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I think you should remit the claimant and his case to some other jurisdiction.

You will pardon me, if in making these suggestions, which I admit are not directly called forth by your letter, you conceive that I have trespassed too far upon a province that is exclusively your own.

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

HON. JAMES HARLAN,

*Secretary of the Interior.*

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CONTRACT FOR OCEAN MAIL STEAMSHIP SERVICE BETWEEN UNITED STATES AND BRAZIL

The Postmaster General, under a statute authorizing proposals for ocean mail steamship service between the United States and Brazil, accepted the bid of the "New York, Neuvinas, and Cuba Steamship Company," chartered to carry freight, passengers, and mails between New York and Cuba. There were two other proposals for the contract. Afterwards, all the stock-holders of that company formed a new corporation, with power to carry the mails between the United States and Brazil, and obtained the assent of the Postmaster General to a change of the name of the company to that of the "United States and Brazil Mail Steamship Company." Six months subsequently to the award of the contract to the company, and after the formation of the new corporation, the next lowest bidder demanded that the contract be awarded to him, on the ground of defect of power on the part of the company to perform the contemplated service. *Held*, 1st, That the Postmaster General should have disregarded the proposal of the "New York, Neuvinas, and Cuba Steamship Company;" 2d, That he had no power to execute a contract with the "United States and Brazil Mail Steamship Company;" 3d, That the objection urged by the second bidder not having been made within a reasonable term, the contract could not be awarded to him or to the third bidder; and, 4th, That in due execution of the act, the Postmaster General should invite new proposals for the service.

ATTORNEY GENERAL'S OFFICE,

June 12, 1865.

SIR: I have received and considered your letter of the 26th ultimo, and will now give you the result of my reflection upon the questions which you submit to me.

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The case presented is this: By the act of May 28, 1864, (18 Stats., 93,) the Postmaster General was authorized to invite proposals for ocean mail steamship service between the United States and Brazil, and to contract with the lowest responsible bidder for the service, for a term of ten years. The statute provided that the bidder or bidders accepted by the Postmaster General should be "a party or parties of undoubted responsibility, possessing ample ability to furnish the steamships required for the service, and offering good and sufficient sureties for the faithful performance of such contract."

An invitation for the proposals having been regularly extended to the country by advertisement, three bids were offered; one by a gentleman named C. H. Garrison, who proposed to undertake the service for a compensation of \$135,000 per annum; and another by the "New York, Neuvinas, and Cuba Steamship Company," through its president, James F. Navarro, who offered to make a contract for the service at an annual compensation of \$120,000. The name and offer of the third bidder it is not important to mention. "After careful and thorough inquiry had been made," your letter states, "into the standing and responsibility of the parties, bidders and guarantors, the Postmaster General accepted the proposal of the 'New York, Neuvinas, and Cuba Steamship Company,' as tendered by its president, Mr. Navarro." This decision was made on November 2, 1864. More than six months after the award of the contract to the company, on May 12, 1865, Mr. Garrison, the next lowest bidder, objected to this award, on the ground that *his* "was the lowest bid from any party competent to contract for the service," and claimed that the proposed contract should accordingly be awarded to him. In the meantime, however, after the proposal of the said company had been accepted by you, and before the date of the communication of Mr. Garrison, all the persons interested as stockholders in the "New York, Neuvinas, and Cuba Steamship Company," together with certain other persons, formed a company, and organized a corporation, under

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the general incorporation laws of the State of New York, called the "United States and Brazil Mail Steamship Company," for the purpose of acquiring and navigating steam vessels to transport passengers, freights, and mails, between the United States and Brazil. The articles of incorporation are dated February 11, 1865.

Subsequently also to the acceptance of the bid of the company, the president, Mr. Navarro, applied to you, as you state, "for authority to change the name of the said company to that of the 'United States and Brazil Mail Steamship Company.'" You assented, on February 27, 1865, to this proposition, provided you were furnished with satisfactory evidences that the parties to the new organization were identically the same as those interested in the bid which the Department had accepted. This evidence, on March 9th, 1865, was furnished to you, and the fact may be taken to be that the interests of all the stockholders in the old were intended to be, and were, preserved in the constitution of the new company.

I have thus stated all the material facts of the case. I will now briefly mention my opinion on the questions of law that they present.

In the first place, I am of opinion that the proposal of the "New York, Neuvinas, and Cuba Steamship Company" should have been rejected by the Department as soon as it was opened. That company was utterly deprived, by the very terms of its charter, of legal capacity to make any contract with the Government for the performance of the service authorized by the statute of 1864. It was not, therefore, a "*responsible bidder*," or a party of "*undoubted responsibility*," within the meaning of the act of Congress. The company was incorporated to carry "freight, passengers, and mail matter between the ports of New York, in the State of New York, and Neuvinas and Santiago de Cuba, in the Island of Cuba." It was created a corporation for that specific purpose, and, therefore, could lawfully enter into no contract which was not necessary, either directly or incidentally, to enable it to fulfill and answer

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that purpose. Every contract, not of such a character, which the company might have attempted to make would have been absolutely invalid, and incapable of being enforced against it.

It cannot, of course, be pretended that a contract to carry the mails between the United States and Brazil was directly or incidentally necessary to enable this company to fulfill the purpose of its existence, as declared by its charter of incorporation. Such a contract is entirely foreign to that purpose, and the corporation had no power to bind itself to perform the service that it proposed to undertake. Its proposal should, therefore, have been rejected, in my opinion, when the bids were opened, and the proposed contract awarded to one of the other parties.

I am of opinion, also, that the United States are not bound to adhere to the award made by the Department, by reason either of your acceptance of the company's proposal or of the responsibility of the sureties who were named in connection with it, or of the assent given by the Department to the formation of the new organization.

The United States, in my opinion, are not estopped, by the effect of all these circumstances in combination, from denying at this time the competency of the company to enter into this contract and refusing to complete the arrangement with the new corporation.

The *acceptance* of the proposal cannot bind the Government, because you had no power to accept any proposal not offered by a "responsible bidder." Your authority was limited by the terms of the statute, and any exercise of power beyond the sphere of your statutory authority, such as the acceptance of a proposal made by an incompetent, and, therefore, within the meaning of the statute, absolutely and legally *irresponsible* party, cannot affect the Government with any liability for your act. I regard, also, the character of the proposed sureties as an element of no importance in the inquiry. The object of the statute was to procure safe and cheap carriage of the mails. The Department was, therefore, charged with the duty of select-

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ing some one capable of contracting for the service. That was the primary thing to be done. The next, and an entirely collateral, object was to secure ample guaranty that the party with whom a contract for the service in question should be made would fulfill the obligations of the contract. The Government cannot compel the sureties in such a contract to carry the mails. The only resort it could have to them would be for the recovery of damages for breach of the principal's engagement. I am of opinion, also, that the consent which you gave to the transmutation of the Company, whose proposal was accepted, into the new organization called the "United States and Brazil Mail Steamship Company" does not bind the Government to adhere to the terms of the proposal offered on behalf of the "New York, Neuvas, and Cuba Steamship Company." You have no power to execute a contract under the statute of 1864 with the "United States and Brazil Mail Steamship Company." That corporation did not propose to perform or bid for the service. You have no statutory authority to make a contract with any but a responsible *bidder*. The fact that the same interests are retained in the new that existed in the old organization is of no manner of importance. The old company has an identity quite distinct in law from that of the new company. It is a different person. It may or may not recognize the proposal of the old organization as binding upon it; and, even if it should, you cannot confer upon it authority or engage to pay it to carry the mails, because your power was limited by the statute to making a contract with an accepted *bidder* for that service. I take it, therefore, that your assent to the effect which has been mentioned, may be treated as a nullity.

The only remaining point for consideration is as to the effect of the lapse of time upon the demand which has been recently made by Mr. Garrison, that the contract shall be awarded to him. While I am of opinion that his neglect, in not directing at the proper time your attention to the point of difficulty in regard to the company whose proposal was accepted, cannot validate the proposal of



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that company, I am clear that it has the effect of depriving you of power to award the contract to him. If, when the bids were opened, or within a reasonable time thereafter, this gentleman had taken his present objection, it would have been your duty to decide between his proposal and that of the other person who offered. The contract might or might not have been awarded to him; *non constat*, it would have been given to him, for it might have been given to the highest bidder, on the ground of his superior responsibility. I cannot tell how that would have been, nor can you *now*. The first bidder, Mr. Raynor, cannot be presumed to have continued his offer throughout the six months that have elapsed since the awarding of the contract. I cannot think that the law would presume that Mr. Raynor, and any others who may have offered, continued their offers beyond the date of your actual acceptance of the company's bid. An offer is presumed to continue (when no time is fixed by the offerer) for a reasonable time after it is made, and for a no longer period. I think, then, under the circumstances of the case, as I understand them, you cannot decide at this time between those who made bids under the advertisements of the Department, and award the contract to the proper party in the same way that you would have done if, while the whole subject was open, your attention had been called to the fatal objection, now pressed upon you, to the competency of the Cuba company.

The conclusion upon the whole case would seem, therefore, to be, that it will be necessary for the Department, in order to execute the statute of 1864, to invite, by new advertisements, fresh proposals for this mail steamship service.

The following are, in a condensed form, the propositions that I have intended to affirm in the foregoing opinion :

1. That the "New York, Neuvitas, and Cuba Steamship Company" had no power to make a contract with the United States to perform the service mentioned in the statute of May 28, 1864, and that its proposal for the said

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Case of E. G. Arnold.

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service should have been disregarded when the respective bids were opened and considered by the Department;

2. That the Department has no authority to execute a contract, under the act of May 28, 1864, for the said mail steamship service, with the "United States and Brazil Mail Steamship Company;"

3. That by the effect of lapse of time and the laches of the party who now protests against the execution of a contract conformably to the proposal of the Cuba company, the Department cannot accept the proposal of either of the remaining bidders; and,

4. That in due execution of the statute of 1864, it will be necessary to invite new proposals for the said service.

I am, sir, very respectfully,  
Your obedient servant,

JAMES SPEED.

Hon. W. DENNISON,  
*Postmaster General.*

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CASE OF E. G. ARNOLD.

1. An acting master's mate is not a warrant officer of the navy.
2. The sentence of an acting master's mate, dismissing him from the service, by a court-martial convened by the commander of a fleet, may be lawfully carried into execution, on the confirmation of the officer ordering the court.
3. Neither the President nor Secretary has lawful authority to approve or disapprove the sentence in such a case.
4. If a sentence in such a case was in fact approved by the Secretary of the Navy, the President has no power, after the sentence has been carried into execution, to set aside the order of the Secretary, and restore the party to the service.

ATTORNEY GENERAL'S OFFICE,  
June 20, 1865.

SIR: You referred to me a few days ago, an application made to you on behalf of E. G. Arnold, of Rhode Island, late an acting master's mate in the navy, to set aside an order of the Secretary of the Navy, approving the sentence

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Case of E. G. Arnold.

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of a general court-martial dismissing Mr. Arnold from the service, as guilty of insubordinate conduct.

This application covered a copy of the record of the court in the case of Mr. Arnold, and also an elaborate argument of counsel in favor of the application. All these papers I have carefully considered, and I will now present to you my view of the case.

The first question is, whether you have authority to exercise any jurisdiction whatever in the case? The source of your power, if any you have, must be the fountain of all law under the Constitution—the statutes of the United States. I therefore turn to the acts of Congress, for the purpose of seeing whether the legislature has conferred upon the President power to review the action, either of the Secretary of the Navy or of the court-martial, in the case of Mr. Arnold.

The proceedings of the court, in that case, were instituted and conducted under the provisions of the act for the better government of the navy, approved July 17, 1862. (12 Stats. at Large, 600.)

The court who tried and convicted the accused, was convened in the waters of the United States, by Rear Admiral Lee, under “express authority from the President of the United States.” The party arraigned before it was an acting master’s mate. The sentence of the court-martial was that the accused be “dismissed the naval service of the United States.” That sentence was approved and confirmed by Admiral Lee, the commander of the fleet, and the officer who ordered the court. The record of the proceedings seems to have been transmitted to the Secretary of the Navy, and, on his approval of the sentence, the judgment of the court was carried into execution. You are now asked to set aside the order of the Secretary, by which that judgment was confirmed. But, what authority had the Secretary of the Navy to approve or disapprove of the sentence? The act of 1862 provides that all sentences of courts-martial, other than those which extend to the loss of life, shall be “carried into execution

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Case of E. G. Arnold.

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on confirmation of the commander of the fleet, or officer ordering the court, except such as go to the dismissal of a commissioned or warrant officer, which are first to be approved by the President of the United States." If this sentence extended to the "dismissal of a commission or warrant officer," it could not have been lawfully executed without the approval of the President. If the accused was not either a commissioned or a warrant officer, the approval of Admiral Lee, who ordered the court, was all that was required to give validity to the execution of the sentence.

The point, therefore, upon which the whole case turns, is the proper denomination of an acting master's mate; is he, in the meaning of the act of 1862, a warrant officer or not? If the view should be that he is not a warranted officer, the President cannot exercise any revisory jurisdiction in the case. The sentence of Mr. Arnold, in that event, was lawfully carried into execution, without the approval of the President.

An *acting* master's mate is certainly not a warrant officer, unless a master's mate comes within that denomination. The former is temporarily appointed to the duties of the latter. If the latter were a warrant officer, the former would not be deemed a "petty officer," and might hence be regarded as a warrant officer within the meaning of the act of 1862, by the effect of its 18th section, which provides that officers temporarily appointed to the duties of a commissioned or warrant officer shall not be deemed petty officers. The point of inquiry, therefore, is, whether a master's mate in the navy is a warrant officer? I am informed that the records of the Navy Department show that since the year 1843, no master's mate has received a *warrant* on being appointed to that position; and every statute bearing on the subject, that I have found, and enacted subsequently to that date, treats officers of the grade in question as simply appointed or rated, and not as warranted officers.

The act of June 1, 1860, regulating the pay of the navy,

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Case of E. G. Arnold.

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(12 Stats., 26,) enumerates among the "warranted officers" only boatswains, gunners, carpenters, and sailmakers, and the same enumeration of the officers who hold warrants is made in the 6th section of the statute of March 3, 1863. (12 Stats., 818.) The act of July 2, 1864, (13 Stats., 373,) authorizing assimilated rank to be given to the warrant officers of the navy, declares who shall be known as "warrant officers in the naval service of the United States;" and they are the same officers as those mentioned in the act of June 1, 1860, namely, boatswains, gunners, carpenters, and sailmakers. The recent act of March 3, 1865, (13 Stats., 539,) defines the pay and style of acting master's mates. It styles them *mates*, and provides that they may be "*rated* under the authority of the Secretary from seamen and ordinary seamen who have enlisted in the naval service for not less than two years." I may also refer to the 2d section of the act of July 2, 1864, (13 Stats., 373,) as further describing the character of master's mate and acting officers of that grade.

The foregoing are the principal statutes, preceding and following the statute of July 16, 1862, that define the character of the officers in question. It appears that the practice of appointing master's mates without warrants, which has prevailed in the naval service since 1843, is coincident with their late statutory character.

I may remark that one of the regulations, recently established by the Secretary of the Navy, treats acting master's mates as entitled to receive warrants on their promotion to be master's mates. (Navy Regulations, 1865, p. 46.) But this regulation was probably transcribed, inadvertently, from one in force before 1843, and without reference to the recent statutory provisions, and the more modern practice of the Department.

A master's mate not being then classed among the warrant officers of the navy, an acting master's mate cannot be denominated a warranted officer.

I am of opinion, therefore, 1st. That the Secretary of the Navy had no authority to approve or disapprove the

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Commissioner of Freedmen's Bureau.

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sentence of the court in the case of this officer. 2d. That the approval of the Secretary being a nullity, no occasion is presented for a review of his action by the President. 3d. That, under the statute of 1862, the authority to approve the sentence of the court-martial in the case of this officer was vested in the officer who convened the court. 4th. That the sentence having been thus approved, was lawfully carried into execution without the confirmation of the President. And 5th. As an ultimate conclusion from the foregoing propositions, and as a direct answer to the question intended, as I understand, to be submitted to me, you should not grant the prayer of the present application.

I return herewith the papers which I had the honor to receive from you.

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

The PRESIDENT.

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DUTY OF COMMISSIONER OF THE FREEDMEN'S BUREAU.

It is the duty of the Commissioner of the Freedmen's Bureau to take control only of such portions of the lands described in the statute of 1865, as he may, in the exercise of his authority, set apart for the use of loyal refugees and freedmen.

## ATTORNEY GENERAL'S OFFICE.

June 22, 1865.

SIR: I have received a communication from Major General Howard, Commissioner of Freedmen, Refugees, and Abandoned Lands, asking my opinion on a question touching his official duty under the 4th section of the statute of March 3, 1865.

This question should, more regularly, have been submitted to me through you. I have no authority, as you are aware, to give an official opinion on any question not

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Commissioner of Freedmen's Bureau.

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referred to me by the President, or the Head of an Executive Department. Presuming, however, that you would have sent Major General Howard's letter to me if he had desired it, I treat the question as one regularly submitted, and beg leave now to state to you my views on the point presented.

The point is this: Whether it is the duty of the commissioner, under the act of 1865, to take charge and control of all abandoned lands, or all tracts of land that have been abandoned, or to which the United States may have acquired title by confiscation or sale, or otherwise, within the insurrectionary States, or whether it is his duty to take charge and have control of only such portions of the said lands as he may, under the direction of the President, set apart for the use of the loyal refugees and freedmen?

There are few statutes that are disfigured by loose and indefinite phraseology to a greater extent than the act of 1865, establishing this bureau; but close attention to the words of the more prominent provisions of the law will enable us, I think, to answer the question of the Commissioner, without doing much violence to any part of the act. Where Congress, as in this case, has taken so little pains to express its intention, no man can, of course, be certain that any construction of the words employed reaches the true meaning of the legislature.

By the 1st section of the act, there is established in the War Department a bureau of refugees, freedmen, and abandoned lands. To this bureau, the section declares, there "shall be committed, as hereinafter provided, the supervision and management of abandoned lands, and the control of all subjects relating to refugees and freedmen from rebel States," &c. It will be observed, in the first place, that the *absolute* supervision and management of abandoned lands—the supervision and management of such lands, I mean, to all intents and for all purposes—are not committed to the bureau in this section, but simply the supervision and management of those lands to the extent, and for the purposes, afterwards provided in the act.

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Commissioner of Freedmen's Bureau.

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It will be seen, in the second place, that the qualification intended to be introduced by the words "as hereinafter provided," attach only to the subject-matter of abandoned lands, and not to the subject-matter of freedmen and refugees. So that while to the bureau is committed, by this first section, the control of *all* subjects relating to refugees and freedmen, without any exception, qualification, or reservation, it would seem that it is entrusted with the supervision and management of abandoned lands only to the extent, and in the manner, provided in another part of the statute. Now the 4th section of the act relates to the authority which the commissioner may exercise, and the duties he is to perform in regard to abandoned and other lands in the insurrectionary States. He has *authority*, under the direction of the President, to set apart *for the use* of loyal refugees and freedmen the lands in question; and he is *required* to assign to every male of that class of persons, not more than forty acres of such lands.

The first is the only authority, and the second is the only duty, so far as I am able to discover, that he has to exercise and perform in regard to the lands in question. So far as it may be necessary for him to exercise supervision and management of those lands, in order to the full execution of the authority and the due performance of the duty set forth in the 4th section of the act, is he required to supervise, and manage them, and no further, as I apprehend.

He has authority under the act to reduce into his control all the lands in question, if they are needed for the use of the refugees and freedmen, or any portions of them that may be thus needed; but it is not his duty, under the statute, to assume the control of any lands that he does not desire to apply to the use mentioned in the statute, or to set apart for the benefit of the persons who are placed under his care.

It seems to me plain that Congress looked primarily in this legislation to the personal and social interests of loyal refugees and freedmen, and not to the care of the lands



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Claim of Fisk and Hatch.

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described in the 4th section of the act. It was intended that the land should be made use of to conserve the interests of the refugees and freedmen; and that so far as it might be necessary for the commissioner to supervise, manage, and control the lands, in order to execute the primary design of Congress, which was to provide, as I have said, for loyal refugees and freedmen, it was intended that he should exercise authority over them. In other words, his authority with regard to the lands is, in the contemplation of the statute, an incident of his power in regard to the persons mentioned in the act. This is the spirit, I believe, of the legislation; and, so interpreting the act, I am of opinion that it is the duty of the commissioner to take and have control of only such portions of the lands described in the statute as he may, in the exercise of the authority given to him by the act, and under the direction of the President, set apart for the use of loyal refugees and freedmen.

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

HON. EDWIN M. STANTON,  
*Secretary of War.*

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CLAIM OF FISK AND HATCH.

The holders of a United States note, which was stolen before maturity, and, after an alteration by the thief of the number upon the note, was transferred to the holders for a valuable consideration, and without notice of the larceny, are entitled to receive payment of it from the Government.

ATTORNEY GENERAL'S OFFICE,

June 24, 1865.

SIR: I have considered the case relative to the one hundred dollar treasury note (No. 82,437) held by Fisk & Hatch, of New York, presented by the Comptroller of the Treasury in his letter to you of the 16th instant.

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• Claim of Fisk and Hatch. 

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It appears that this note, having been deposited by a Mrs. Twiss in the Sonhegan Bank for safekeeping, was stolen before maturity by burglars, who obliterated the figure *seven* in the original number, (82,437,) for the purpose, perhaps, of preventing the discovery of the note and the detection of the crime, through public advertisement of the larceny, and then passed the note away. In this condition it came to the possession of Messrs. Fisk & Hatch, of New York, for a valuable consideration, and without notice of the larceny, who now claim the amount of it from the United States.

The first question that I am asked is, whether this alteration of the number of the note is such an alteration of a material portion of the instrument as to be a forgery?

Russell, the highest modern British authority on the jurisprudence of crimes, declares that it is necessary in order to constitute forgery of a true written instrument by alteration, that the alteration shall occur in a material part of the instrument, *whereby a new operation is given to it.* (2 Russell on Crimes, 318.) Another more recent author on the criminal law of England and America, Mr. Bishop, declares the same doctrine, thus: "Any alteration of a written instrument, whereby its legal effect is in any degree varied, is an act sufficient in forgery." (2 Bishop on Criminal Law, § 471.) In another section of the same chapter, the writer says: "The alteration to be sufficient must be material." Mr. Wharton, in his standard and recently enlarged work on the same subject, states the law to be, that "the instrument when forged must be such that it does or may tend to prejudice the rights of another." (2 American Criminal Law, § 1419.) These several definitions of forgery are the expression of the result of all the adjudications touching the subject, collated by the respective writers whom I have named.

The alteration of a lease of the manor of Dale by changing the letter D into S, would be a forgery, though if a conveyance of the manor of Dale be made to read "*the beautiful manor of Dale.*" it will not amount to a forgery.

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Claim of Fisk and Hatch..

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(*Rex vs. Treble*, 2 Leach, 1040-42.) So, if a bond be not required by law to be attested by a subscribing witness, no forgery is committed by falsely adding to it a witness' name. (*The State vs. Gherken*, 7 Ired., 206.) These are cases that exemplify the doctrine that an alteration of a true instrument must give a new operation to it—must vary its legal effect—in order that the alteration shall amount to a forgery at the common law.

Is the present alteration one of that character? I apprehend that it is not. The effect of this alteration of the number, placed upon the note in question, was not to vary, in the slightest particular, the legal operation of the instrument. It was placed there simply for the convenience of the Government, and never was an essential part of the document. The alteration, in short, was not a change in any circumstance material to the value of the note.

I hold it, therefore, not to be a forgery in the sense of the common law, though the act of alteration is punishable as a crime under special statutes of the United States.

The second question that you present is, whether such an alteration as here occurred affects the title of one whose right is derived through the criminal? I answer that it does not of itself; but I can conceive how the circumstance of the alteration might, in some aspects of the case presented, affect the right of the parties who hold the instrument on the point of the knowledge of those parties, at the time of the transfer to them, of the circumstances which impeach the title as between the antecedent parties.

The Supreme Court of the United States has recently declared, in the case of a security, like this, transferable by delivery, that "a party who takes it before due for a valuable consideration, *without knowledge of any defect of title and in good faith*, holds it by a title valid against all the world." (*Murray vs. Lardner*, Dec. term, 1864, No. 116.) Did these parties receive the note in question without knowledge of the defect of the title of the vendors and in good faith? I cannot tell. But I do conceive how it would be possible for a jury to find, with perfect pro-

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National Military and Naval Asylum.

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priety, against them on that issue, if they could be affected with knowledge of the fact that a hundred dollar note, issued under the act of July 17, 1861, numbered 32,487, had been stolen, and the erasure of the figure seven was so clumsily effected that the alteration would have been discoverable by a cautious and prudent man of business.

The question of their want of knowledge and good faith might, in other words, I think, in a supposable case, depend somewhat on the character of this erasure. But, if the case be one of utter want of knowledge and perfect good faith on the part of the parties who claim to receive the amount of the obligation, I am of opinion that, though they derived their right through the thief and alterer of the note, the alteration does not *ipso facto* impair or affect their title.

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

Hon. HUGH McCULLOCH,

*Secretary of the Treasury.*

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CHARTER OF THE NATIONAL MILITARY AND NAVAL  
ASYLUM.

The charter of this association requires that a majority of the persons named therein shall accept the same, and such acceptance and organization of the company cannot be by proxies.

ATTORNEY GENERAL'S OFFICE,

June 26, 1865.

SIR: By the act of Congress approved 8d of March, 1865, entitled "An act to incorporate a National Military and Naval Asylum for the relief of the totally disabled officers and men of the volunteer forces of the United States," one hundred persons named in the act, "and their successors, duly chosen, are constituted and created a body

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National Military and Naval Asylum.

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corporate in the District of Columbia." The 2d section enacts "that the said corporation hereby constituted shall consist of one hundred members. They shall have power to fill all vacancies created by death, resignation or otherwise, to make by-laws, rules, and regulations." The act devolves upon a definite number of persons a specific duty. Less than a majority of that number cannot lawfully act.

The act being silent as to proxies, it must be presumed that personal presence was intended. Whether, after the charter is accepted and the corporation organized, it could not by law, rule or regulation, admit proxies, need not be decided. Until such acceptance and organization, there is no party or legal person to determine the sufficiency or insufficiency, the validity or invalidity of proxies. If the charter of this corporation could be accepted, and the company organized by proxies, though an aggregate corporation by its charter, the corporators could convert it into a sole corporation. Such power is not expressly conferred, nor can it be implied. The principle that requires aggregate bodies to act by majorities forbids such an implication.

I am, therefore, of the opinion that in order to accept the charter and organize thereunder, a majority of the persons named therein must be present, and that the acceptance of the charter and organization of the company cannot be by proxies.

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

Hon. E. M. STANTON,  
*Secretary of War.*

## Case of Kingsbury &amp; Co.

## CASE OF KINGSBURY &amp; CO.

1. The Government has a legal claim for damages against those parties on account of their failure to fulfil their contract with the Navy Department for the delivery of blankets and blue flannel.
2. The Secretary of the Navy is not bound to compel the payment of damages, if he is of opinion that their default was the result of the failure of the Government to pay their accounts, and it could not have been avoided by the proper efforts of the parties.

ATTORNEY GENERAL'S OFFICE,

June 30, 1865.

SIR: I have received your letter of the 19th instant, in which you restate the facts of the case of N. Kingsbury & Co., and submit for my consideration the question to which I will presently refer.

The facts of the case seem to be briefly these: On July 8, 1862, this firm entered into a contract with the United States, by which they agreed, *whenever required* during the fiscal year ending June 30, 1863, to furnish and deliver at their own risk and expense, at certain designated navy-yards, and at certain stipulated prices, *any number* of blankets and any quantity of blue flannel, that might be ordered of them, provided they should receive sixty days' notice of the quantity at any time required.

It was agreed that twenty per centum of the amount of each payment should be withheld by the Government as collateral security for the due performance of the contract, and that the remaining eighty per cent. should be payable in certificates of indebtedness, or in treasury notes, at the option of the Government.

The contract further provided that, if default should be made by the contractors in delivering all or any of the flannel and blankets, of the quality and at the times and places required, the contracting parties should forfeit and would pay to the United States, as liquidated damages, a sum equal to twice the amount of the stipulated contract of the articles, in case of the actual delivery thereof.

I understand from your letter that the numerous requisitions made upon the contractors during the year em-

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Case of Kingsbury & Co.

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braced by their agreement, were only partially filled ; in other words, that the parties broke their contract on various occasions in this, that they did not, after due notice, furnish and deliver the number and quantity of the respective articles ordered from them by the Government. But the bills rendered for the goods actually delivered were approved, and eighty per cent. of their respective amounts paid by the Government, the residue being retained or reserved according to the provisions of the contract.

The account being now finally adjustable, the question on which you ask my opinion is, whether the Department has a just claim for damages against Kingsbury & Co. on account of which it is entitled to retain the said reservations, and any other funds in its hands ?

The fact on which the contractors rely, as furnishing by its legal effect a complete bar to such a claim for damages, is, that after the approval of the bills for the eighty per cent. payments, there was in every case a delay at the Treasury, owing to a want of funds, in paying the bills, the period of delay varying from forty to ninety days after the date of the approved bills. They contend that the prompt payment on demand, after the inspection and reception of the goods, and the approval of the bills, of the eighty per cent., was essential to entitle the Department to call for further deliveries, and that inasmuch as the Government failed to make such prompt payment, they are in law excused from fulfilling the obligation into which they entered, and complying with the requisitions of the Department.

I am of opinion that this view of their case is founded upon an erroneous construction of the present contract. Although it is a continuing contract, and one intended to embrace an indefinite number of constantly recurring transactions touching the same subject-matter, it is a severable engagement, and divisible in its operation. The obligations of the respective parties touching each transaction, are determinable exclusively with reference to that transaction, and without regard to the transactions that

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Case of Kingsbury & Co.

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may have preceded or followed it. When the Department, on any occasion, gave notice to the contractors that on a day named it would require a certain number of yards of flannel, say a thousand yards, and required the contractors to furnish the amount by the appointed time, the obligation of the parties became fixed and absolute under the contract to furnish the required amount of that article, no more, no less; and they could no more relieve themselves from that obligation on the ground that payment on account of a previous order had not been duly and promptly made by the Government, than they could escape from the liability to answer for a default in regard to such a requisition on the ground that the Government had failed in the case of a previous and entirely distinct contract to make payment, duly and promptly, according to its exigency. The obligation of the parties to fulfil a requisition upon them, made according to the terms of the contract, was, in no just legal sense, dependent upon the obligation of the Government to pay promptly for goods previously delivered on a former requisition, and they could not have relieved themselves in law from performing the whole or any part of their engagement to deliver goods, according to the order of the Department, by showing that the Government had failed on a previous occasion to make prompt payment for other articles which had been delivered. In other words, I am of opinion that according to the true interpretation of this contract, all the transactions between the parties pursuant to it are so far separate and distinct that no one of them furnishes any part of the consideration upon which another depends, that the whole consideration of the stipulation of Kingsbury & Co. to deliver the goods embraced by one transaction, was the promise of the Government to pay for them as provided in the contract; and that no part of such consideration consisted of another previous promise relating to, or growing out of, any other antecedent transaction.

The doctrine is now settled that the dependency or independency of mutual covenants does not arise from the use



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Case of Kingsbury & Co.

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of any particular phraseology, or on the collocation of words or sentences in an instrument. The nature of the transaction, and the effect and design of the parties, are to be looked at, and such construction is to be given as will best effectuate their object and do justice between them. On looking at these considerations, I think it best comports with the design of this agreement to construe the stipulations as distinct and independent, to be performed by each party for himself independently of any performance by the other, and that each is liable to the other for any damages sustained by the non-performance of what either undertook to perform on his part.

There is no stipulation in the contract, it may be further observed, that the Government will pay the contract price at or within any particular time after the delivery of the goods. The promise is, that it will pay a certain price for all the goods furnished, delivered, inspected, approved, and received, and the agreement is that this price shall or may be paid in treasury notes. This is the whole stipulation on that point. The sale, therefore, by its very terms, was to be a sale upon credit. The property in the goods was to be vested in the Government before any payment whatever was to be made. The title of the Government was not made dependent upon the payment of the purchase money, and the whole reliance of the contractors was the credit of the Government, which was pledged by the agreement to make good to the contractors the contract value or price of the articles delivered. But when, or within what time, the price was to be paid, the contract does not provide. I cannot, in the absence of an express or clearly implied stipulation to such an effect, hold that the Government bound itself absolutely to pay for the goods instantly on their delivery and reception, or that payment for the goods required by, and delivered on, a particular order, was a condition precedent to the right of the United States to call for further amounts. That the parties did not contemplate such a construction of the contract, appears to me evident from the introduction of the express stipulation,

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Case of Kingsbury & Co.

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that the contractors should forfeit if they made default in delivering all or any of the flannel and blankets at the times and places provided, twice the amount of the contract price of the articles with regard to which they might be thus in default. The effect of this express agreement is to overcome any presumption in favor of such an implied stipulation as the contractors believe is contained within the four corners of the instrument.

It may be contended, however, that the measure of the damages sustained by Kingsbury & Co., by reason of the default of the Government in making prompt payment of their bills, is the very amount that they have thus become liable to pay the Government as damages for their failure to carry out their contract. It is stated that the non-payment of the funds which were due to them by the Government, and which they relied upon to enable them to continue their business and fulfill their obligations, prevented them from carrying out their engagement. If by reason of this failure on their part, the Government is entitled to claim damages for the injury which it has sustained, they, the contractors, it may be said, are entitled to recoup, or set-off against such claim, the amount of damages which they have sustained on account of the failure of the Government to furnish the moneys that had accrued to them under the contract. The amount of such damage, it may be contended, is measurable, very plainly, by the extent of the claim of the Government against them, because if the Government had not broken its engagement, they would have fulfilled their's; and thus the extent of their injury may be said to be the extent of the Government's demand.

I am of opinion, however, that the only claim, if any, legally sustainable by the parties, on account of the failure of the Government promptly to pay the contract price of the articles actually furnished, would be for interest upon the amounts due, from the time they were respectively demandable. When the goods were delivered, inspected, and approved, the Government became liable for a pro-

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Case of Kingsbury & Co.

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portion of the stipulated price, and any undue retention of the purchase money might have entitled the contractors to receive interest, but not, I am of opinion, to recover any such consequential damages as those to which reference is made.

If I have, in thus construing this contract, correctly apprehended its import, it would seem to follow that Kingsbury & Co., have no adequate legal defence to the claim of the United States to be compensated for such damages as may have been sustained by reason of their failure to fulfill their contract, and that you are legally entitled to retain from the reservations, or any other funds belonging to the parties in the hands of the Department, the full amount of the damages.

How will you measure the damages? If you measure them according to the rule of the contract, you have authority to charge them, in the account, with twice the amount of the contract price of the articles, which they failed to deliver from time to time; but, if you compute the damages according to the actual loss or injury sustained by the United States, you may charge them with the difference between the contract price of those articles and the amount which the Government was required to pay for the same goods in the market, or otherwise, in order to supply the wants of the navy, if the failure of the parties in fact compelled the Government to purchase elsewhere at higher rates than those stipulated in the contract.

While these are your legal rights in the premises, I do not think that it is your duty to exact damages, according to either of the foregoing rules of computation, from the parties, if on a review of all the circumstances of the case, you are persuaded that Kingsbury & Co. acted throughout in entire good faith, and that their failure to perform the contract, according to its strict terms, was owing to the delay of the Government in making its payments. I do not believe that, according to the letter of the contract, they can resist the legal right of the United States to claim

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The Proclamation of June 13, 1865.

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and receive damages for their default; but, if it is proven to your complete satisfaction, that the Government was, *in fact*, instrumental in placing it beyond their power to execute the contract, and that all the efforts upright business men usually make to enable them to fulfill their engagements, were made by these parties, and withal they failed, I do not think you are, in duty bound, to compel the payment of damages.

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

HON. GIDEON WELLES,

*Secretary of the Navy.*

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## THE PROCLAMATION OF JUNE 13, 1865.

The proclamation of the President of June 13, 1865, removing restrictions generally upon trade with the States recently in insurrection, and announcing the suppression of the rebellion in Tennessee, is lawful under the statutes of the United States.

ATTORNEY GENERAL'S OFFICE,

June 12, 1865.

SIR: I have the honor to acknowledge the receipt of your letter of this date, wherein you submit to me the draft of a proclamation removing restrictions generally upon trade with the States recently in insurrection against this Government, and relieving the State of Tennessee from any disabilities which may have been incurred in consequence of that condition, and ask my official opinion as to the legal competency of the President to adopt such a measure.

The proposed proclamation has two objects: first, to permit trade as freely as possible with the States and territory lately in insurrection; and secondly, to declare and proclaim that the inhabitants within the limits of the State of Tennessee are no longer in insurrection.

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The Proclamation of June 13, 1865.

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The doubt as to the power of the President to make the trade free, as proposed, arises upon the construction of the act of Congress of July 2, 1864. I had occasion to give a construction to this act, in an opinion to the President, dated May 5, 1865. That opinion was given when war was actual and flagrant, and when the rebels still had in the field a large organized force, and occupied a vast territory. Since that time, the lieutenant general has announced to the President that there are no military lines betwixt the United States forces and the rebel forces; in other words, that there are no military lines within the limits of the United States.

By the 9th section of the act of July 2, 1864, so much of the 5th section of the act of July 13, 1861, as authorized the President, in his discretion, to license and permit commercial relations in any State or section, the inhabitants of which are declared in insurrection, is repealed; but the right and power is retained in the President to license and permit trade so far as it may be necessary to supply the necessities of loyal persons residing in insurrectionary States within the lines of actual occupation by the military forces of the United States, as indicated by published order of the commanding general of the department or district so occupied. It is manifest from this act that Congress did not intend to prohibit all intercourse and trade betwixt the loyal States and the persons residing in the insurrectionary districts, but did intend that within the lines of actual occupation by the military forces of the United States, there might be intercourse. The act of July 13, 1861, permitted the President to license and permit trade betwixt the loyal States and persons residing within the lines of military occupation by the rebels; the act of July 2, 1864, takes that power from the President, but expressly leaves with him the power to license and permit trade between the loyal States and persons residing in an insurrectionary district, but within the lines of military occupation by the United States forces. Trade can be permitted by the President to the extent that the necessi-

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The Proclamation of June 18, 1865.

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ties of the loyal persons residing within such military lines may require. Now, as the military lines mentioned in this act have been all wiped out, and there is no part of the country in the military occupation of the rebels, the question arises, has the President's power to license trade with insurrectionary States become extinct, or does his power to license still remain, and if so, to what extent?

As has been seen, the act retains or reserves to the President the right to permit trade within the military lines of occupation by the United States forces. As that occupation extended, the power to license of course extended with it. When the military occupation embraces the whole country, the power to license also embraces the whole country. The act contemplated that trade, more or less extended, as the exigencies of the war would permit, and the necessities of the loyal persons in the insurrectionary districts might require, should follow in the wake of the military occupation of the country. The military occupation and lines mentioned in the act had reference to an opposing and organized enemy. The military commanders and the military departments spoken of in the act, had like reference. As long as there was an opposing military force, the duty of the commander was not only to meet the enemy in battle but to see also that the enemy did not receive supplies through or from the loyal States. That commanders might perform these duties, military departments were erected. There are now no such duties to be performed; there is now no organized enemy to fight or to be supported by supplies. There are, therefore, now no such commanders and departments as were contemplated by the act. There may be, and I believe there still are, commanders of departments in insurrectionary territory with defined boundaries, but they are not the commanders referred to in the act, nor have they such military lines as the act contemplated. The act speaks of, and looks to, commanders and departments in an actual state of war, having power and duties growing out of the fact that there is an organized enemy in the field, and that there are lines

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The Proclamation of June 18, 1865.

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that can be defined betwixt the opposing forces. Of such commanders and such departments alone does the act speak. It does not contemplate that military commanders should be appointed and military departments be erected to the end that trade might be licensed. Congress did not intend by this act, except in a state of actual war, to place trade under the control of military commanders and military departments. My conclusion, therefore, is that there are now no such commanders, and no such military departments, as were contemplated by this act. Nevertheless, the power of the President remains to license and permit trade. It exists under the act of the 18th of July, 1861, and is specially saved, as has been before shown, under the act of the 2d of July, 1864. What, then, is the extent of the President's power to license trade? Clearly to the extent that the necessities of the loyal persons in the insurrectionary districts may require. As loyalty increases in those districts day by day or month by month, so will the necessities of that people require that trade should increase. By the act the President is made the sole judge of what are or are not the necessities of the loyal persons.

I can perceive no reason why the President may not permit trade by proclamation. That would be a permit or a license. Nor can I see why he may not by his proclamation designate the customary agents of the Treasury Department as the persons who are to supervise the trade. It follows from what I have said that there can be no objection to the legal competency of the President to issue such a proclamation. I suppose there can be no question but that it is within the political power of the President to withdraw by proclamation the people of Tennessee from the effect of the proclamation announcing that they were in insurrection.

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

Hon. WM. H. SEWARD,

*Secretary of State.*

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Savannah Cotton.

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## SAVANNAH COTTON.

The Executive Department of the Government has no power to appoint a commission and confer upon it jurisdiction to examine the claims for the cotton captured at Savannah by the military authorities, in December, 1864, and turned over by them to the Treasury agents appointed under the provisions of the act of March 12, 1863, with a view to the restoration of the proceeds of so much of the cotton as may belong to loyal claimants; but the proceeds of the sale of all such cotton should be paid into the Treasury to await the action of the Court of Claims and of Congress.

ATTORNEY GENERAL'S OFFICE,

*July 5, 1865.*

SIR: I have the honor to acknowledge the receipt of your letter of the 17th ultimo, submitting for my opinion the questions that have arisen in your Department in the case of the "Savannah cotton."

The circumstances under which the property in question came into the possession of the Government are stated in your letter substantially as follows:

On the occupation of the city of Savannah, in December last, by the United States forces under Major General Sherman, some thirty-eight thousand (38,000) bales of cotton were found stored there. This property was seized and taken possession of by the military authorities, and by them turned over to agents of the Treasury Department as "captured property," pursuant to the provisions of the acts of Congress of March 12, 1863, and July 2, 1864. (12 Stats., 820; 13 *Id.*, 375.) After it was thus received by the appropriate agents, the property was forwarded to New York, and there sold at auction, as provided by law.

You state that a number of claims for the proceeds of the sales are now being presented to your Department; some of the claimants being residents of Savannah, who aver that they have been loyal to the Government during the rebellion; others, being subjects of foreign governments, resident in Savannah or abroad, averring that they were neutral during the late conflict; others, again, being



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Savannah Cotton.

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northern merchants, stating that they came into possession of the cotton claimed by them in payment of, or security for, debts contracted prior to the rebellion; and still others claiming restitution of their property, or its proceeds, on the ground that the cotton in question was not capturable, or properly "captured property," and should not be held and treated as such.

The first question arising on this state of facts that you submit is, whether the property to which reference has been made should or should not be regarded as "captured," under the acts of Congress of March 12, 1863, and July 2, 1864.

I do not perceive that either of the statutes provides what property shall be regarded as "captured property," within the meaning of the law. A definition of "abandoned" property, however, is contained in the first section of the act of 1864. The statute provides that *property*, real or personal, shall be regarded as *abandoned* when the lawful owner shall be voluntarily absent therefrom, and engaged, either in arms or otherwise, in aiding or encouraging the rebellion. (13 Stats. at Large, 376.) But I apprehend that there need be no difficulty in determining, for our present purposes, what property is comprehended by the phrase "captured property," as used in these statutes, for the phrase is its own sufficient explanation. I suppose that all movable property, other than that species described by the proviso to the first section of the act of 1863, *actually and hostilely seized and taken* on land, by a military officer or soldier of the United States, in a State, or any portion of a State, designated as in insurrection against the United States, may be regarded as "captured" within the meaning of the statutes of 1863 and 1864. I do not intend to say that no other property than that I have thus endeavored to describe may be denominated and treated as "captured property" under these statutes. It would seem, by the 7th section of the act of 1864, that certain property seized and taken by naval forces, viz., property seized by the navy "upon any of the inland waters of the

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Savannah Cotton.

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United States," may be dealt with in the manner provided by the laws under consideration. (13 Stats. at Large, 377.) Whether this section takes away the prize jurisdiction of the courts in all cases of seizure of water-borne property on the inland waters of the United States, effected there by naval commissioned captors, and commits all jurisdiction over such cases to the Court of Claims and to Congress, must remain for judicial determination. But the Supreme Court has recently decided that private property seized by a naval force on land bordering upon one of the inland waters of the insurrectionary South, was not the subject of prize jurisdiction, and was receivable by the Treasury agents under the statute of 1863. (Mrs. Alexander's cotton, 2 Wallace, 423.) This decision was rendered in a case to which the act of 1864 did not apply, the capture there considered having been made prior to the passage of that statute. I refer to it for the purpose of showing that certain cases of purely naval capture must pursue the course indicated in the statute for the collection of abandoned and captured property.

I have said that property seized or taken by any military person in the insurrectionary territory is denominated as "captured," but the 6th section of the act of 1863, would seem to affix that character to "cotton, sugar, rice, and tobacco" received by any United States officer or soldier within insurrectionary districts. The section provides that it shall be the duty of every officer or private soldier who may take or receive abandoned property, or any cotton, sugar, rice, or tobacco, from persons in insurrectionary districts, or have such property under his control, to turn the same over to an agent of the Treasury Department; and it further provides that refusal or neglect to do so shall subject such an officer or soldier to trial and punishment. (12 Stats. at Large, 821.)

Property of the foregoing character thus turned over to a Treasury agent, and in that manner "received" by him, must be dealt with as the second section of the act provides; that is, it must be sold, and its proceeds paid in to

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Savannah Cotton.

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the treasury, there to await the action of the Court of Claims, when duly invoked.

Thus it appears that all cotton received by, or that may have come under the control of, any military officer or soldier, whether it was actually seized or captured by him or not, must be dealt with as "abandoned or captured property." I may have occasion, hereafter, to comment upon the effect of this provision.

The statute, it may be said, thus affixes to all cotton, as well as all the other articles above stated, that may be under the control of a military or naval officer in the insurrectionary districts, the *de jure* character of "captured" property; and when such property is received by a treasury officer, appointed to execute the provisions of the acts of 1863 and 1864, it becomes, it may be said, *de facto* "captured" property, and must be disposed of accordingly.

I am of opinion, therefore, that the cotton found by our army at Savannah, taken possession of there by the military authorities, and received from them by the agents of the Treasury Department, is and should be regarded as *de facto* and *de jure* "captured" property under the statutes of 1863 and 1864.

The second question which you propound is, whether, if this property be of the character that I am of opinion it is, the power rests with the Secretary of the Treasury or the President to appoint a commission to examine the claims, and restore to loyal claimants the proceeds of so much of the property in question as they can show to have been legally theirs.

I am of opinion that neither the President nor any other executive officer can restore, or authorize such a commission as you suggest, to make restoration of, the proceeds of their captured property to these loyal claimants.

Congress, by the legislation under consideration, has reserved to itself the power of finally disposing of the claims of the alleged owners of this property; and so long as that legislation exists, the claimants must pursue the

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Savannah Cotton.

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remedy which it indicates for the establishment and enforcement of their rights. By the Constitution Congress has exclusive power "to make rules concerning captures on land and water." The present legislation, I apprehend, is clearly an exercise of that power. This is a general and comprehensive sovereign prerogative. Under other systems of government, the authority to make such rules may be exercised by the political department, but in this country, the legislative department of the Government possesses exclusive authority, both to establish rules for the regulation of the right of capture in time of war and also to provide the method by which all questions touching captures may be determined.

The present legislation is not so much a regulation of the right of capture, though the 6th section of the act of 1863 may be interpretable as authorizing, if not commanding, the seizure of certain kinds of property found by our military forces within the hostile districts of the south, as it is a provision for the judicial ascertainment of the rights of persons affected by captures that may have been, or may be, made in the progress of our belligerent operations set on foot for the reduction of the rebellious southern country. Congress took notice of the *fact* that captures of private property on land had been, and would continue to be made, by the armies operating in and against that territory, as a necessary and proper means of diminishing the wealth and thus reducing the power of the insurgent rulers. It was not expected that such captures had been, or would be, in all cases well and wisely made, or that, in the course of such predatory hostility, the innocent would not sometimes suffer as well as the guilty. Nor was it thought well that the administration, so to speak, of so much of the property within the enemy's territory as might be reduced into the possession of the military forces, should be controlled by or under executive authority. In this view of existing facts and of just policy, the system provided by the act of 1863 was devised for the adjudication and decision of the cases contemplated by the statute.

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Savannah Cotton.

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The Secretary of the Treasury was authorized to appoint agents to "collect all abandoned or captured property" in the enemy's country. To secure faithful and honest performance of their duty, the Secretary was authorized to require such agents to give bonds, in such amounts as he might deem necessary. The duty of the agents was to receive all property in the insurgent States which was in fact captured or seized out of the enemy's possession by the military authorities. They had no duty or power to inquire whether or not such property had been rightfully captured; whether the generals who reported it to them for collection had observed, in effecting the captures, what are called "the recognized usages of war," or had violated all the principles of writers on what we term the law of nations,\* supposed to tend against the right of seizing private property on land; but it was the duty of the Treasury agents simply to receive all property reported to them as having been captured, irrespective of any considerations touching the legal exemption of any of it from seizure, and to dispose of it in the manner provided by the law.

After the conversion of the property into money, the proceeds were directed to be paid into the treasury. The words of the statute are, "the proceeds thereof shall be paid into the Treasury of the United States." But these proceeds do not pass into the treasury as proceeds of property sold under a judicial sentence of confiscation. They are not sequestered or condemned, but simply held by the United States, so to speak, *in trust* for those who may, in the manner provided, and in the time limited by the law, ultimately establish a legal right to receive them after pacification.

When the insurrection has been suppressed, the owners are authorized to invoke the jurisdiction of the Court of

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\* Eminent jurists, as Mr. Wheaton has shown, have questioned, with great force, the propriety of using the term *droit de gens* as applicable to those rules of conduct which obtain between nations. Such criticism is made by Rayneval, Bentham, Savigny, and, more lately, by Twiss. (Dana's Wheaton on International Law, 18.)—ED.

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Savannah Cotton.

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Claims, and obtain there an adjudication of their respective claims.

The proceeds of the property are thus in the possession of the United States, subject to the adjudications of that court; and when it shall have passed upon the claimants' rights, and decreed in their favor, Congress has solemnly declared that they shall receive restitution of their property. In the presence of such legislation, (covering, as it does, the entire subject-matter, providing for the safe custody of the property in question pending hostilities, and for the final judicial determination of the rights of the parties in interest,) I cannot see that the Executive has power to make a different disposition of the property from that provided by Congress, or authorize any one to determine the questions which Congress has intrusted to the decision of another forum.

I am, therefore, of opinion, in reply to your inquiry, that jurisdiction cannot be conferred upon a commission, appointed either by the President or the Secretary of the Treasury, to examine the claims in question, and to make restoration of the proceeds of so much of this cotton as may belong to loyal claimants.

The third and last question you propound is, what disposition should be made of the proceeds of the sales of the property. I think that it is your duty to see that the direction of the act of Congress is obeyed by those in whose hands these proceeds may be. The statute says that after the sale of any abandoned or captured property, "the proceeds thereof shall be paid into the Treasury of the United States." I am of opinion, therefore, that the proceeds of the property in question should be paid into the treasury, there to await the action of the Court of Claims and of Congress.

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

Hon. HUGH McCULLOCH,

*Secretary of the Treasury.*

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Penal Duty under the Internal Revenue Law.

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## PENAL DUTY UNDER THE INTERNAL REVENUE LAW.

Under the 14th section of the Internal Revenue Act of June 30, 1864, the assessor has power, in all cases of false or fraudulent lists or valuations, to add the penal duty of one hundred per centum before the lists have been returned to the collector, but such power terminates on the transmission of such lists to the collector.

ATTORNEY GENERAL'S OFFICE,

July 10, 1865.

SIR: I am in receipt of your letter of the 23d ultimo, asking my opinion touching the proper construction and application of a certain provision contained in section 14 of the act of June 30, 1864. (13 Stats., 227.)

The provision to which reference is made is, that "in case of the return of a false or fraudulent list or valuation, he (the assessor) shall add one hundred per centum to such duty," namely, the duty assessed in the manner provided in the previous part of the section. The question raised is, whether assessors should be instructed to apply the penal tax of one hundred per centum in all cases of the return of false and fraudulent lists or valuations? If the answer should be in the negative, the further question is asked, to what class of cases is this penal tax applicable?

You have, very properly, in your letter directed my attention to the various and conflicting views that are entertained relative to the scope of the application of the provision to which I have made reference, and also indicated those classes of cases touching which doubt has been mainly suggested as to the duty and power of the assessors to enforce payment of the one hundred per cent. penal tax. I am therefore relieved of the necessity of extending my examination of this intricate and involved statute beyond the ground embraced by your communication.

I. In the first place, I understand it to be contended, that in the case of a false or fraudulent return, made by a manufacturer or producer, of the monthly products and

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Penal Duty under the Internal Revenue Law.

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sales of articles enumerated in sections of the act subsequent to the 85th, as liable to duties, the assessor has no power to add one hundred per centum to the duties payable upon the amount and value of such manufactures or products as assumed and estimated by the assessor, but that in such a case of a false or fraudulent return of such manufactures or products, he can only add to the duties fifty per cent. of their amount. This view is suggested by the provision contained in the 85th section of the act, "that in case of the manufacture and sale, consumption or delivery, of any goods, wares, merchandise, or articles, as hereinafter mentioned, without compliance, on the part of the party manufacturing the same, with all the requirements and regulations prescribed by law in relation thereto, the assistant assessor may, upon such information as he may have, assume and estimate the amount and value of such manufactures or products, and upon such assumed amount assess the duties, and add thereto fifty per centum." (13 Stats. at Large, 260.) The argument is, that even if it should be clear that the provision of the 14th section, to which I have referred, embraces lists or returns required to be made more frequently than annually, yet that inasmuch as the 85th section is later in the statute than the 14th, and makes special provision in the case of the manufacture and sale, or production and sale, of the articles afterwards enumerated, its provisions must govern and control in the case of articles manufactured or produced, that are referred to in the section as liable to duty, and required to be returned to the assessing officers, and therefore that the only penal tax capable of being assessed, in the case of a false or fraudulent return of such articles, is the penal tax of fifty per centum mentioned and provided in the section under consideration. The argument assumes, however, that there is a manifest and total repugnance between that clause of the 14th section, to which reference has been made, and the provision of the 85th section, for only on that ground can it be held that the latter section was designed, in the case of the manu-



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Penal Duty under the Internal Revenue Law.

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factures and products afterwards in the act enumerated, to abrogate the former provision of the law.

I am able to discover no such conflict between the two provisions as is assumed. They provide, and were manifestly, I think, intended to provide, for two classes of cases entirely diverse, different, and distinct in their character. The provision of the 14th section under consideration contemplates cases of false or fraudulent returns, the other enactment, cases in which, through negligence, inadvertence, or neglect, unaccompanied by any fraudulent or wrongful intent, parties have manufactured, produced, and sold articles mentioned in the statute, which were not duly returned conformably to the law. The one provision acts upon cases in which falsification or fraud may have been committed; the other contemplates and defines the duty of assessing officers in cases of deficient returns in which there is present no element of falsification or fraud, and also in cases where sales have occurred of which no returns were made, by reason of negligence or accident, without the presence of any fraudulent intent or purpose in the minds of the parties.

So I think it clear, that if a manufacturer or producer of any of the articles referred to in the 85th section should at the end of any month present a false or fraudulent return, within the meaning of the law, of his manufactures or products and sales during the period embraced by the return, he would be liable to pay the one hundred per cent. penalty provided by the 14th section in such case, notwithstanding the provision contained in the 85th section of the statute. I may remark that the word "false," as used in the 14th section of the act, has a somewhat technical signification. It is always accompanied by the other word "fraudulent," with which, perhaps, it may be regarded, as used in this statute, as almost if not quite synonymous. It is not every return which fails to disclose all taxable articles proper to be returned, that can be denominated as a "false" return within the meaning of this law. But every such return which was made with the

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Penal Duty under the Internal Revenue Law.

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intent to evade a proper valuation, enumeration, or assessment, is properly denominated as "false." There must, I think, in other words, be some evidence of willful or fraudulent mistake, omission, or neglect, in order to bring a deficient return within the penal provision of the statute.

But it may be said that the 14th section only provides for the assessment and collection of this penal duty in cases of false or fraudulent *annual* returns to the assessors, and does not apply to returns of manufactures which, under the law, are required to be made monthly. If such be the true construction and effect of the section, the power of the assessors to levy the penal tax of one hundred per centum is, of course, confined to cases of false or fraudulent annual lists, and does not extend to cases of other returns. I am of opinion, however, that this point is not well taken. I think that a false or fraudulent monthly return is, equally with other classes of returns, within all the provisions of the section.

It is probable that as the section was originally drafted, it did not embrace within its purview any other than the annual returns or lists, and that by subsequent amendment it assumed its present form.

It is distinctly, however, enacted, that "if any person shall not deliver a monthly or other list or return without notice at the time required by law," or, "if any person shall deliver to any assessor or assistant assessor any list, statement, or return, which, in the opinion of the assessor, is false or fraudulent," the assessor may, in either case, make a proper list or return for the party, and assess the statutory duty; and the section then further provides, that "in case of the return of a false or fraudulent list or valuation, he shall add one hundred per centum to such duty." Monthly as well as annual returns are, therefore, within the jurisdiction of the assessor for the purpose of assessing, in proper cases, this penal tax. In the case of any return contemplated and mentioned in the section, the assessor has power to inquire whether it was falsely and fraudulently made, and if in his opinion it was so made, he has

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Penal Duty under the Internal Revenue Law.

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the further power and duty of assessing against the party the penal tax. We have just seen that monthly lists or returns are distinctly contemplated and mentioned in the 14th section as within the jurisdiction of the assessors there defined.

II. The second point of construction arising under the 14th section, to which my attention is called, is as to the power of an assessor, after the delivery of a monthly or other return to the collector, to add the penal tax upon discovering the fact that the return had been falsely or fraudulently made by the party rendering it. I am of opinion that in case of a false or fraudulent list, the penalty must be assessed prior to the transmission of the return to the collector. The power is one conferred expressly upon the assessor; it cannot be exercised by the collector. The jurisdiction of the assessor over the return ceases when it has passed into the hands of the collector for the collection of the duty.

The whole section is devoted to the subject of assessing duties or taxes in the several cases of refusal or neglect to make returns, and of the delivery of false or fraudulent ones. It provides minutely how duties shall be assessed in such cases. It authorizes the summoning and interrogation of the parties, arrests for contempt of the summons of the assessor under the process of district judges, personal examination, and inspection by the assessors of the premises of the parties. And, finally, it requires, in all the cases mentioned, certain penal taxes to be added to the duties as assessed under information thus elicited, and "the amount so added to the duty," the statute provides, "shall in all cases be collected by the collector, at the same time, and in the same manner, with the duties."

The further provision closes the section, that "the lists or returns so made and subscribed by such assessor or assistant assessor, shall be taken and reputed as good and sufficient lists or returns for all legal purposes." It seems to me clear that it was intended that the powers thus conferred, and the duties thus imposed upon the assessors, in

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Penal Duty under the Internal Revenue Law.

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cases of fraudulent returns, must be exercised and performed prior to the delivery of the returns as rendered to the collector.

I am, therefore, clearly of opinion, that in all cases of the return of false or fraudulent lists or valuations, the penal duty must be added, and may only lawfully be assessed, before the transmission of the lists or valuations to the collectors.

The United States, however, are not without remedy, in cases where fraud is detected subsequently to the delivery of the returns to the collectors. The 15th section makes it a criminal offence to disclose or deliver to any assessor a false or fraudulent list or return, and provides punishment by fine or imprisonment, in such a case, on the conviction of the party before any district or circuit court. This remedy may, of course, be resorted to, either before or after the delivery of a return to the collector, in any case of falsification or fraud.

I am therefore of opinion, that the power of the assessing officers to add the penal duty of one hundred per centum, in cases of false or fraudulent returns or valuations, terminates on the transmission of the returns or lists to the collectors, but that in all cases of the return of false or fraudulent lists or valuations, they may add that duty before the lists or valuations have been returned to the collectors.

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

Hon. HUGH McCULLOCH,

*Secretary of the Treasury.*

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Tenure of Navy Agents.

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## TENURE OF NAVY AGENTS.

1. On the expiration of the commission of a navy agent, the office becomes vacant unless a new appointment is made.
2. Opinion of Attorney General Butler, in case of Leonard M. Parker, (2 Opin., 714,) questioned.
3. The sureties in the bond of a navy agent are liable only for his acts during the continuance of his commission.

## ATTORNEY GENERAL'S OFFICE,

*July 11, 1865.*

SIR: I am in receipt of your letter of the 7th instant. The first question on which you desire my opinion is, whether the office of navy agent becomes vacant if the incumbent is not reappointed, and a new appointment of another person is not made, upon or prior to the expiration of the commission of the incumbent?

The act of May 15, 1820, (3 Stats., 582,) provides that the officers therein named, and they include navy agents, "shall be appointed for the term of four years, but shall be removable at pleasure." The 2d section of the statute, after providing specially for the termination of the commissions of such of the various officers embraced in the enactment as were then in office, declares "that all other such commissions shall cease and expire at the expiration of the term of four years from their respective dates." I did not suppose that under this statute any well-founded doubt was capable of being raised as to the time when the official term of a navy agent expired, until I discovered that a learned Attorney General, Mr. Butler, was of opinion that, notwithstanding the statute of 1820, the officers mentioned therein must be considered as holding their offices until their successors shall be duly appointed and qualified. (2 Opin., 714.) The case in which Mr. Butler rendered this opinion was that of Leonard M. Parker, naval officer at Boston, whose commission expired on December 17, 1835, and whose successor was not appointed until February 27 of the next year. During this interval, it seems, the duties of the office were performed

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Tenure of Navy Agents.

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by a person who was a deputy of Mr. Parker when his commission expired, and certain fees had accrued to the naval officer, "on the principle of the usual and legal distribution of fees where there is a naval officer." Mr. Butler was of the opinion that the amount of these fees was payable to Mr. Parker, on the ground that, in contemplation of law, Mr. Parker continued to hold the office until his successor entered upon its duties. The learned Attorney General draws, in his opinion, a distinction between elective and judicial officers and mere ministerial and administrative officers. He thinks that the former cannot, while the latter may, be allowed to exercise their functions after the expiration of the terms of service for which they were appointed. But I am unable to perceive any well-founded or reasonable distinction between the cases. Every man holding a public office under the law, holds it according to the law, and not otherwise. When the time limited by law as the official term of the appointee, whether he be an administrative or any other kind of officer, expires, his official existence is determined, and unless a new appointment is made, either of the former incumbent or of another person, the office becomes vacant.

There is no need, however, that I should elaborate an argument on the point in question. The Supreme Court has expressly decided that, under the act of 1820, collectors can only be appointed for four years, and that at the end of this term the office becomes vacant, and must be filled by a new appointment. (*United States vs. Eckford's Executors*, 1 Howard, 258.) The office of navy agent, under the statute of 1820, stands, of course, precisely on the same footing. I regard it, therefore, an adjudicated point, that on the expiration of the commission of a navy agent, either the incumbent must be reappointed or another must be appointed to the office, or otherwise it becomes vacant.

In reply to your second inquiry, I am of opinion that the obligatory force of a navy agent's bond, as against the sureties, is confined to acts done by the officer while his

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Confiscation Act—Title of Purchasers.

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commission has a legal continuance, and that the legal liability of the sureties terminates at the expiration of the term of the officer's appointment.

You have not advised me of the form of the bond given by these officers; but I take it for granted that its condition is the usual and simple one, that the officer has performed his duties faithfully, and that he shall continue so to perform them. Under such a bond, the Supreme Court has repeatedly decided that the sureties are responsible only for the faithful performance of his duties by the officer for the legal term of his appointment. (*United States vs. Kirkpatrick*, 9 Wheaton, 734; *United States vs. Nicholl*, 12 *Ibid.*, 509; *United States vs. Eckford's Executors*, 1 Howard, 259.)

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

Hon. GIDEON WELLES,

*Secretary of the Navy.*

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CONFISCATION ACT OF JULY 17, 1862—TITLE OF *BONA FIDE* PURCHASERS.

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The right of the United States to the property of persons within the provisions of the Confiscation Act of July 17, 1862, is vested, *eo instanti*, on the commission of the offence which works the forfeiture.

ATTORNEY GENERAL'S OFFICE,

July 23, 1865.

SIR: Your letter of the 12th instant is accompanied by a communication addressed to your Department by the firm of G. Wheelwright & Co., of New York, in which two inquiries are propounded that you desire me to reply to. Without stating the questions in the very words used by these gentlemen, I understand the points on which they desire information to be as follows:

First. Whether there is any law or lawful regulation to prevent that firm from purchasing cotton, naval stores,

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Confiscation Act—Title of Purchasers.

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and tobacco of residents of North Carolina who have voluntarily participated in the late rebellion, and have not been pardoned, and the estimated value of whose taxable property is over twenty thousand dollars; and secondly, whether such persons can lawfully sell such merchandise to that firm, or consign to them for sale?

It may be, perhaps, sufficient, in reply to both these inquiries, to recall to you one or two provisions of the act of July 17, 1862, commonly known as the Confiscation act. The 6th section of that statute enacts that all the estates and property, moneys, stocks, and credits of any person within any State, who after the passage of that statute, being engaged in armed rebellion against the Government of the United States, or in aiding or abetting such rebellion, did not, within sixty days after the President's proclamation of July 5, 1862, cease to aid and abet such rebellion and return to his allegiance, is liable to seizure and condemnation. All cotton, naval stores, tobacco, and other property, therefore, belonging to residents of North Carolina, within the 13th exception contained in the late amnesty proclamation of the President, who did not cease to aid and abet the late rebellion within sixty days of the proclamation to which I have referred, and who have not obtained special pardons from the President, may at any time be seized and confiscated. The question, however, is, whether any such property may be purged, so to speak, of the forfeiture declared by the statute, by a sale to a *bona fide* purchaser for value?

If the forfeiture attaches to the property at the time the offence was committed, all intermediate sales between the commission of the offence and seizure of the property under the act are avoided; but if it does not attach till seizure made, or suit brought, then the legitimate title of a *bona fide* purchaser, for a valuable consideration, acquired between the commission of the offence or the acquisition of the property and its seizure, is not divested. This question, as to the proper construction and legal effect of the



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Confiscation Act—Title of Purchasers.

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act of 1862, is a very important one. It is, also, a question of some difficulty, in the absence of authoritative judicial consideration and interpretation of this law. I am not aware that the point has ever been passed upon by any court of the United States. The question, however, is substantially the same as the one that arose under the non-intercourse act of 1809, and which was before the Supreme Court in the case of *The United States vs. 1,960 Bags of Coffee*. (8 Cranch, 398.) The goods in that case were libelled for a violation of the act of 1809, and were claimed by purchasers for valuable consideration. The United States demurred to that part of the claimant's plea which stated the purchase, &c., so that the question fairly arose whether the alleged forfeiture was purged by the sale. The court held that the forfeiture occurred on the illegal importation, and divested the title of the purchasers. Judge Story was of a contrary view, and delivered an elaborate dissenting opinion.

A contrary effect was given by the Supreme Court to the act of December 31, 1792, declaring a forfeiture of any vessel or its value for which a register may have been obtained on a false oath. (*United States vs. Grundy et al.*, 3 Cranch, 351.) In the later case of *Caldwell vs. The United States*, (8 Howard, 378,) it was held that, under the 68th section of the act of the 2d of March, 1799, the forfeiture is the statutory transfer of the right to the goods at the time the offence was committed, and that under the 66th section of the same statute, on the contrary, the rights of third persons, acquired *bona fide* before an election of the Government to recover the goods or the value, are protected.

With respect to the application of the doctrines, evolved by these adjudications, to the statute of 1862, I can but give you my individual opinion, that under that act, interpreted in the light of the decisions of the Supreme Court, the right of the United States to the property of persons within its provisions is transferred to it instantly on the commission of the several acts respectively which work

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Confiscation Act—Title of Purchasers.

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the forfeiture. It is not necessary that I should elaborately expound my reasons for entertaining this opinion. One ground need only be stated.

The statute distinctly provides that all sales, transfers, or conveyance of any property belonging to a person within the provision of the 6th section, before cited, shall be null and void, and that it shall be a sufficient bar to any suit brought by such person for the possession or use of such property, or any of it, to allege and prove that the suitor is one of the persons described in that section.

I cannot see how any southern man who is within the 6th section of the act of July 17, 1862, and who remains unpardoned, can make a valid sale or consignment, as against the United States, of any property belonging to him.

The foregoing considerations apply, I may remark, to the cases of persons in North Carolina, and the other insurrectionary States, who are not within the 6th section of the statute; but who, owning property in any loyal State, gave aid and comfort to the rebellion after the passage of the confiscation act.

It is thus plain, if my view of the proper construction and effect of the statute of 1862 is the correct one, that merchants in the North cannot acquire, as against the United States, good title to any property owned by the residents of the southern States, within the provisions of that statute, who have not been accorded by the President the benefits of the recent amnesty of the Government.

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

Hon. HUGH McCULLOCH,  
*Secretary of the Treasury.*

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Property Transferred by Rebel Authorities.

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**PROPERTY OF THE UNITED STATES TRANSFERRED BY  
REBEL AUTHORITIES.**

Such property in the hands of persons within the jurisdiction of a friendly foreign State may be recovered by appropriate judicial proceedings instituted by the United States in the courts of the foreign Government.

**ATTORNEY GENERAL'S OFFICE.***July 13, 1865.*

SIR: I have received and read the dispatch of our consul general at Havana, relative to his action touching certain property received by parties in that city from the so-called confederate government or its agents.

It seems, so far as I can gather from the consul's dispatch, that this property is of two descriptions—first, property belonging to the United States, which was stolen at the beginning of the recent hostilities by the insurgents; and second, property formerly under the control and in possession of the rebel military authorities in Texas, as the public property of the so-called confederate government, the title to which is believed to have passed to, and become vested in, the United States, under the terms of the recent surrender of the rebel military chief, Kirby Smith.

I presume that the question you desire me to answer is, in what way the United States may assert their right to, and recover possession of, this property, under the circumstances that surround it?

I answer, by appropriate judicial proceedings, instituted in the proper local tribunal in Cuba. I have no doubt that the Spanish law affords a remedy, ample and adequate, for the enforcement of the rights of this Government, in respect to the property in question.

I would, therefore, advise that the consul general be instructed to take the opinion of a competent lawyer in Cuba, on the question involved in the case presented, with a view to the institution of legal proceedings in that island for the recovery of the property.

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Capture of Steamer Governor Troupe.

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"There is nothing in the laws of nations," says Mr. Justice Story, in delivering the opinion of the Supreme Court in the case of the "Santissima Trinidad," "which forbids a foreign sovereign, either on account of the dignity of his station, or the nature of his prerogative, from voluntarily becoming a party to a suit, in the tribunals of another country, or from asserting there, any personal or proprietary or sovereign rights which may be properly recognized and enforced by such tribunals." (7 Wheaton, 358.)

I have the honor to return herewith the dispatch of the consul general.

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

Hon. WM. H. SEWARD,  
*Secretary of State.*

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CAPTURE OF STEAMER GOVERNOR TROUPE.

General Gillmore, in command at Savannah, had authority in April, 1865, to stipulate for the payment of a just compensation to rebel deserters for the capture of a rebel vessel lying in an interior river, and the stipulated compensation should be paid by the War Department after the performance of the service and the delivery of the vessel into the possession of the United States.

ATTORNEY GENERAL'S OFFICE,

July 28, 1865.

SIR: Your letter of the 17th instant, covering copies of certain papers relative to the capture of the steamer "Governor Troupe," requests that your Department "may be advised as to the proper action to be taken in the case."

I have carefully read these documents, and the facts of the case, which they present, seem to be these: In the latter part of April last, Colonel Woodford, chief of staff,

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Capture of Steamer Governor Troupe.

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to Major General Gillmore, employed, at Savannah, two men, deserters from the confederate army, to capture and deliver to the military authorities of the department, a rebel steamer called the "Governor Troupe," then lying in Altamaha river. Colonel Woodford agreed to pay each of them fifteen hundred dollars if the enterprise succeeded, and also to pay as many persons as they might find it necessary to employ, to aid them in the capture, one hundred dollars each. Under and in pursuance of this agreement, the vessel was seized by these two men, assisted by others whom they employed, and carried down the river. When she reached the lower part of the river, while she was in the firm possession and undisputed control of her captors, who were carrying her to the place at which they agreed to deliver her to the military authorities, the "Gemsbok," a naval vessel blockading those waters, overhauled and captured her, as a prize of the navy. A prize crew was placed on board, her papers were transmitted to the proper naval officer, and a report of the case, as a case of maritime capture by the navy, was made to the admiral of the station. This officer approved and ratified the action of the officer of the "Gemsbok." A survey and appraisement of the vessel was made under the direction of the naval commander at Port Royal, whither she was sent in charge of the prize master, and she was then appropriated to the use of the Government.

The navy does not appear to have ever abandoned the possession of her, but suffered her to be used by General Gillmore, under the command of a naval officer, in maintaining water communications between Augusta and Savannah. While engaged in this service, under the control of the navy, but in the employment of the army, the vessel was burned.

The men who were employed by Colonel Woodford to make the seizure, now prefer a claim for the reward that officer agreed to pay them for the service. General Gillmore in forwarding their account, states that the contract to which I have referred was "a fair and proper one," and

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Capture of Steamer Governor Troupe.

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asks that he be provided with funds for the payment of the amount, which he believes to be due to the parties. The question, I presume, on which you desire my opinion is, whether they are entitled to be paid that amount? On this point, I have not the slightest doubt. I believe that however the claim may be considered, whether from a legal or an equitable point of view, it ought to be paid by the Government. The agreement on their part was executed by these men, so far as they had power to execute it. Why should not the Government comply with its engagement? If it is supposed that General Gillmore had no lawful authority to seize or order the seizure of this vessel, and that authority to capture her was exclusively vested in the navy, the view is entirely erroneous. Neither under the general public law, nor under the municipal law of this country, is the position maintainable. This vessel was public property of the enemy, used for hostile purposes. By virtue of the situation in which he was placed, and under the general powers incident to his position as the commanding officer of a military department in the enemy's country, General Gillmore had full authority to seize all property in her predicament. I apprehend further, if he had suffered her to go at large, he might have been fairly chargeable with serious dereliction of duty as an officer and a commander. While under ordinary circumstances the military forces under his command would have been the most appropriate agents through whom to effect the capture of such property, yet under the peculiar circumstances of the present case, as mentioned by Colonel Woodford in his report to General Gillmore, I am able to discover no impropriety in the employment of private uncommissioned persons to make the seizure. This, however, is a point on which the judgment of General Gillmore ought to be held conclusive. Whether the capture might have been as well made by officers and soldiers of the army under his command, whom General Gillmore had the power to engage in the

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enterprise, as by those persons who volunteered to perform the service, and to whom it was agreed to pay a reward in case of success, I take it, is a question on which the Government ought to follow his opinion under the circumstances of this case.

I have therefore no doubt that General Gillmore possessed ample authority to make, or to ratify when made by an officer under his command, such an agreement as I have considered. Inasmuch, then, as the service undertaken by the parties who captured the vessel in question, seems to have been substantially performed according to the terms of the agreement, they are legally entitled to the stipulated compensation, and it should be directed to be paid out of any moneys in the treasury, under the control of your Department, appropriated to the payment of such demands. I apprehend that this is the only action which your Department has need or authority to take in the case.

The claim made by the naval persons who dispossessed the men acting under the authority of General Gillmore, and captured the vessel as prize to the navy, to be regarded as the lawful captors of the property, and the question whether they are entitled to take any benefit, under the prize act, from the seizure of the vessel, under the circumstances to which I have referred, are matters for the determination of the court to which the case may have been, or may be, referred by the Secretary of the Navy, under the provisions of the act of June 30, 1864. (13 Stats., 814.)

The court that may have under its control, and subject to its jurisdiction, the value of the property placed there by the Secretary of the Navy, pursuant to that statute, will be competent to decide to whose benefit the condemnation should ensue. But in that adjudication, I am of opinion, the persons whose claim is now under consideration have no interest. It is not a claim which, in any event, whether the value of the property is decreed wholly to the United

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States or otherwise, can be sustained against the fund subject to the adjudication of the prize court.

I am, sir, very respectfully,

Your obedient servant,

J. HUBLEY ASHTON,

*Acting Attorney General.*

Hon. EDWIN M. STANTON,

*Secretary of War.*

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**MILITARY COMMISSIONS.**

The persons charged with the assassination of the President in the city of Washington, on the 14th of April, 1865, may be lawfully tried before a military tribunal.

**ATTORNEY GENERAL'S OFFICE,**

*July, 1865.*

SIR : You ask me whether the persons charged with the offence of having assassinated the President can be tried before a military tribunal, or must they be tried before a civil court.

The President was assassinated at a theatre in the city of Washington. At the time of the assassination a civil war was flagrant, the city of Washington was defended by fortifications regularly and constantly manned, the principal police of the city was by federal soldiers, the public offices and property in the city were all guarded by soldiers, and the President's house and person were, or should have been, under the guard of soldiers. Martial law had been declared in the District of Columbia, but the civil courts were open and held their regular sessions, and transacted business as in times of peace.

Such being the facts, the question is one of great importance—important, because it involves the constitutional guarantees thrown about the rights of the citizen, and because the security of the army and the government in



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time of war is involved; important, as it involves a seeming conflict betwixt the laws of peace and of war.

Having given the question propounded the patient and earnest consideration its magnitude and importance require, I will proceed to give the reasons why I am of the opinion that the conspirators not only may but ought to be tried by a military tribunal.

A civil court of the United States is created by a law of Congress under and according to the Constitution. To the Constitution and the law we must look to ascertain how the court is constituted, the limits of its jurisdiction, and what its mode of procedure.

A military tribunal exists under and according to the Constitution in time of war. Congress may prescribe how all such tribunals are to be constituted, what shall be their jurisdiction, and mode of procedure. Should Congress fail to create such tribunals, then, under the Constitution, they must be constituted according to the laws and usages of civilized warfare. They may take cognizance of such offences as the laws of war permit; they must proceed according to the customary usages of such tribunals in time of war, and inflict such punishments as are sanctioned by the practice of civilized nations in time of war. In time of peace neither Congress nor the military can create any military tribunals, except such as are made in pursuance of that clause of the Constitution which gives to Congress the power "to make rules for the government of the land and naval forces." I do not think that Congress can, in time of war or peace, under this clause of the Constitution, create military tribunals for the adjudication of offences committed by persons not engaged in, or belonging to, such forces. This is a proposition too plain for argument. But it does not follow that because such military tribunals cannot be created by Congress under this clause, that they cannot be created at all. Is there no other power conferred by the Constitution upon Congress or the military under which such tribunals may be created in time of war?

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That the law of nations constitutes a part of the laws of the land, must be admitted. The laws of nations are expressly made laws of the land by the Constitution, when it says that "Congress shall have power to define and punish piracies and felonies committed on the high seas, and offences against the laws of nations." To *define* is to give the limits or precise meaning of a word or thing in being; to make is to call into being. Congress has power to *define*, not to make, the laws of nations; but Congress has the power to make rules for the government of the army and navy. From the very face of the Constitution, then, it is evident that the laws of nations do constitute a part of the laws of the land. But very soon after the organization of the federal government, Mr. Randolph, then Attorney General, said: "The law of nations, although not specifically adopted by the Constitution, is essentially a part of the law of the land. Its obligation commences and runs with the existence of a nation, subject to modification on some points of indifference." (See Opin. Attorney General, vol. 1, p. 27.) The framers of the Constitution knew that a nation could not maintain an honorable place amongst the nations of the world that does not regard the great and essential principles of the law of nations as a part of the law of the land. Hence Congress may define those laws, but cannot abrogate them, or, as Mr. Randolph says, may "modify on some points of indifference."

That the laws of nations constitute a part of the laws of the land is established from the face of the Constitution, upon principle and by authority.

But the laws of war constitute much the greater part of the law of nations. Like the other laws of nations, they exist and are of binding force upon the departments and citizens of the Government, though not defined by any law of Congress. No one that has ever glanced at the many treatises that have been published in different ages of the world by great, good, and learned men, can fail to know that the laws of war constitute a part of the law of

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nations, and that those laws have been prescribed with tolerable accuracy.

Congress can declare war. When war is declared, it must be, under the Constitution, carried on according to the known laws and usages of war amongst civilized nations. Under the power to define those laws, Congress cannot abrogate them or authorize their infraction. The Constitution does not permit this Government to prosecute a war as an uncivilized and barbarous people.

As war is required by the framework of our Government to be prosecuted according to the known usages of war amongst the civilized nations of the earth, it is important to understand what are the obligations, duties, and responsibilities imposed by war upon the military. Congress, not having defined, as under the Constitution it might have done, the laws of war, we must look to the usage of nations to ascertain the powers conferred in war, on whom the exercise of such powers devolve, over whom, and to what extent do those powers reach, and in how far the citizen and the soldier are bound by the legitimate use thereof.

The power conferred by war is, of course, adequate to the end to be accomplished, and not greater than what is necessary to be accomplished. The law of war, like every other code of laws, declares what shall not be done, and does not say what may be done. The legitimate use of the great power of war, or rather the prohibitions upon the use of that power, increase or diminish as the necessity of the case demands. When a city is besieged and hard pressed, the commander may exert an authority over the non-combatants which he may not when no enemy is near.

All wars against a domestic enemy or to repel invasions are prosecuted to preserve the government. If the invading force can be overcome by the ordinary civil police of a country, it should be done without bringing upon the country the terrible scourge of war; if a commotion or insurrection can be put down by the ordinary process of law, the military should not be called out. A defensive

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foreign war is declared and carried on because the civil police is inadequate to repel it; a civil war is waged because the laws cannot be peacefully enforced by the ordinary tribunals of the country through civil process and by civil officers. Because of the utter inability to keep the peace and maintain order by the customary officers and agencies in time of peace, armies are organized and put into the field. They are called out and invested with the powers of war to prevent total anarchy and to preserve the government. Peace is the normal condition of a country, and war abnormal, neither being without law, but each having laws appropriate to the condition of society. The maxim *inter arma silent leges* is never wholly true. The object of war is to bring society out of its abnormal condition; and the laws of war aim to have that done with the least possible injury to persons or property.

Anciently, when two nations were at war, the conqueror had or asserted the right to take from his enemy his life, liberty, and property; if either was spared, it was as a favor or act of mercy. By the laws of nations, and of war as a part thereof, the conqueror was deprived of this right.

When two governments, foreign to each other, are at war, or when a civil war becomes territorial, all of the people of the respective belligerents become by the law of nations the enemies of each other. As enemies they cannot hold intercourse, but neither can kill or injure the other except under a commission from their respective governments. So humanizing have been and are the laws of war, that it is a high offence against them to kill an enemy without such commission. The laws of war demand that a man shall not take human life except under a license from his government; and under the Constitution of the United States no license can be given by any department of the Government to take human life in war, except according to the law and usages of war. Soldiers regularly in the service have the license of the government to deprive men, the active enemies of the government, of their

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liberty and lives; their commission so to act is as perfect and legal as that of a judge to adjudicate, but the soldier must act in obedience to the laws of war, as the judge must in obedience to the civil law. A civil judge must try criminals in the mode prescribed in the Constitution and the law; so, soldiers must kill or capture according to the laws of war. Non-combatants are not to be disturbed or interfered with by the armies of either party except in extreme cases. Armies are called out and organized to meet and overcome the active, acting public enemies.

But enemies with which an army has to deal are of two classes :

1st. Open, active participants in hostilities, as soldiers who wear the uniform, move under the flag, and hold the appropriate commission from their government. Openly assuming to discharge the duties and meet the responsibilities and dangers of soldiers, they are entitled to all belligerent rights, and should receive all the courtesies due to soldiers. The true soldier is proud to acknowledge and respect those rights, and ever cheerfully extends those courtesies.

2d. Secret, but active participants, as spies, brigands, bushwhackers, jayhawkers, war rebels, and assassins. In all wars, and especially in civil wars, such secret, active enemies rise up to annoy and attack an army, and they must be met and put down by the army. When lawless wretches become so impudent and powerful as not to be controlled and governed by the ordinary tribunals of a country, armies are called out, and the laws of war invoked. Wars never have been and never can be conducted upon the principle that an army is but a *posse comitatus* of a civil magistrate.

An army, like all other organized bodies, has a right, and it is its first duty, to protect its own existence, and the existence of all its parts, by the means and in the mode usual among civilized nations when at war. Then the question arises, do the laws of war authorize a different

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mode of proceeding and the use of different means against secret, active enemies from those used against open, active enemies?

As has been said, the open enemy or soldier in time of war may be met in battle, and killed, wounded, or taken prisoner, or so placed by the lawful strategy of war as that he is powerless. Unless the law of self-preservation absolutely demands it, the life of a wounded enemy or a prisoner must be spared. Unless pressed thereto by the extremest necessity, the laws of war condemn and punish with great severity harsh or cruel treatment to a wounded enemy or a prisoner.

Certain stipulations and agreements, tacit or express, betwixt the open belligerent parties, are permitted by the laws of war, and are held to be of very high and sacred character. Such is the tacit understanding, or it may be usage, of war, in regard to flags of truce. Flags of truce are resorted to as a means of saving human life, or alleviating human suffering. When not used with perfidy, the laws of war require that they should be respected. The Romans regarded ambassadors betwixt belligerents as persons to be treated with consideration and respect. Plutarch, in his *Life of Cæsar*, tell us that the barbarians in Gaul having sent some ambassadors to Cæsar, he detained them, charging fraudulent practices, and led his army to battle, obtaining a great victory.

When the Senate decreed festivals and sacrifices for victory, Cato declared it to be his opinion that Cæsar ought to be given into the hands of the barbarians, that so the guilt which this breach of faith might otherwise bring upon the state might be expiated by transferring the curse on him who was the occasion of it.

Under the Constitution and laws of the United States, should a commander be guilty of such a flagrant breach of law as Cato charged upon Cæsar, he would not be delivered to the enemy but would be punished after a military trial. The many honorable gentlemen who hold commissions in the army of the United States, and have been deputed to

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conduct war according to the laws of war, would keenly feel it as an insult to their profession of arms for any one to say that they could not or would not punish a fellow-soldier who was guilty of wanton cruelty to a prisoner, or perfidy towards the bearers of a flag of truce.

The laws of war permit capitulations of surrender and paroles. They are agreements betwixt belligerents, and should be scrupulously observed and performed. They are contracts wholly unknown to civil tribunals. Parties to such contracts must answer any breaches thereof to the customary military tribunals in time of war. If an officer of rank, possessing the pride that becomes a soldier and a gentleman, who should capitulate to surrender the forces and property under his command and control, be charged with a fraudulent breach of the terms of surrender, the laws of war do not permit that he should be punished without a trial, or, if innocent, that he shall have no means of wiping out the foul imputation. If a paroled prisoner is charged with a breach of his parole, he may be punished if guilty, but not without a trial. He should be tried by a military tribunal constituted and proceeding as the laws and usages of war prescribe.

The law and usage of war contemplate that soldiers have a high sense of personal honor. The true soldier is proud to feel and to know that his enemy possesses personal honor, and will conform and be obedient to the laws of war. In a spirit of justice, and with a wise appreciation of such feelings, the laws of war protect the character and honor of an open enemy. When by the fortunes of war one open enemy is thrown into the hands and power of another, and is charged with dishonorable conduct and a breach of the laws of war, he must be tried according to the usages of war. Justice and fairness say that an open enemy to whom dishonorable conduct is imputed, has a right to demand a trial. If such a demand can be rightfully made, surely it cannot be rightfully refused. It is to be hoped that the military authorities of this country will never refuse such a demand, because there is no act of

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Congress that authorizes it. In time of war the law and usage of war authorize it, and they are a part of the law of the land.

One belligerent may request the other to punish for breaches of the laws of war, and, regularly, such a request should be made before retaliatory measures are taken. Whether the laws of war have been infringed or not, is of necessity a question to be decided by the laws and usages of war, and is cognizable before a military tribunal. When prisoners of war conspire to escape or are guilty of a breach of appropriate and necessary rules of prison discipline, they may be punished, but not without trial. The commander who should order every prisoner charged with improper conduct to be shot or hung, would be guilty of a high offence against the laws of war, and should be punished therefor, after a regular military trial. If the culprit should be condemned and executed, the commander would be as free from guilt as if the man had been killed in battle.

It is manifest, from what has been said, that military tribunals exist under and according to the laws and usages of war in the interest of justice and mercy. They are established to save human life, and to prevent cruelty as far as possible. The commander of an army in time of war has the same power to organize military tribunals and execute their judgments that he has to set his squadrons in the field and fight battles. His authority in each case is from the law and usage of war.

Having seen that there must be military tribunals to decide questions arising in time of war betwixt belligerents who are open and active enemies, let us next see whether the laws of war do not authorize such tribunals to determine the fate of those who are active, but secret, participants in the hostilities.

In Mr. Wheaton's *Elements of International Law*, he says: "The effect of a state of war, lawfully declared to exist, is to place all the subjects of each belligerent power in a state of mutual hostility. The usage of nations has



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modified this maxim by legalizing such acts of hostility only as are committed by those who are authorized by the express or implied command of the state; such are the regularly commissioned naval and military forces of the nation and all others called out in its defence, or spontaneously defending themselves, in case of necessity, without any express authority for that purpose. Cicero tells us in his offices, that by the Roman feudal law no person could lawfully engage in battle with the public enemy without being regularly enrolled, and taking the military oath. This was a regulation sanctioned both by policy and religion. The horrors of war would indeed be greatly aggravated if every individual of the belligerent states were allowed to plunder and slay indiscriminately the enemy's subjects without being in any manner accountable for his conduct. *Hence it is that, in land wars, irregular bands of marauders are liable to be treated as lawless banditti, not entitled to the protection of the mitigated usages of war as practiced by civilized nations.*" (Wheaton's Elements of International Law, p. 406, 8d edition.)

In speaking upon the subject of banditti, Patrick Henry said, in the Virginia convention, "the honorable gentleman has given you an elaborate account of what he judges tyrannical legislation, and an *ex post facto* law—(in the case of Josiah Phillips.) He has misrepresented the facts. That man was not executed by a tyrannical stroke of power; nor was he a Socrates; he was a fugitive murderer, and an outlaw; a man who commanded an *infamous banditti*, and at a time when the war was at the most perilous stage he committed the most cruel and shocking barbarities; he was an enemy to the human name. Those who declare war against the human race may be struck out of existence as soon as apprehended. He was not executed according to those beautiful legal ceremonies which are pointed out by the laws in criminal cases. The enormity of his crimes did not entitle him to it. I am truly a friend to legal forms and methods; but, sir, the occasion warranted the measure. A pirate, an outlaw, or a common enemy to all

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mankind, may be put to death at any time. It is justified by the *law of nature and nations*." (Elliott's Debates on Federal Constitution, vol. 8, p. 140.)

No reader, not to say student, of the law of nations, can doubt but that Mr. Wheaton and Mr. Henry have fairly stated the laws of war. Let it be constantly borne in mind that they are talking of the law in a state of war. These banditti that spring up in time of war are respecters of no law, human or divine, of peace or of war; are *hostes humani generis*, and may be hunted down like wolves. Thoroughly desperate and perfectly lawless, no man can be required to peril his life in venturing to take them prisoners—as prisoners, no trust can be reposed in them. But they are occasionally made prisoners. Being prisoners, what is to be done with them? If they are public enemies, assuming and exercising the right to kill, and are not regularly authorized to do so, they must be apprehended and dealt with by the military. No man can doubt the right and duty of the military to make prisoners of them; and being public enemies, it is the duty of the military to punish them for any infraction of the laws of war. But the military cannot ascertain whether they are guilty or not without the aid of a military tribunal.

In all wars, and especially in civil wars, secret but active enemies are almost as numerous as open ones. That fact has contributed to make civil wars such scourges to the countries in which they rage. In nearly all foreign wars the contending parties speak different languages, and have different habits and manners; but in most civil wars that is not the case; hence there is a security in participating secretly in hostilities that induces many to thus engage. War prosecuted according to the most civilized usage is horrible, but its horrors are greatly aggravated by the immemorial habits of plunder, rape, and murder practiced by secret, but active participants. Certain laws and usages have been adopted by the civilized world in wars between nations that are not of kin to one another, for the purpose and to the effect of arresting or softening many of the

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necessary cruel consequences of war. How strongly bound are we, then, in the midst of a great war, where brother and personal friend are fighting against brother and friend, to adopt and be governed by those laws and usages.

A public enemy must or should be dealt with in all wars by the same laws. The fact that they are public enemies, being the same, they should deal with each other according to those laws of war that are contemplated by the Constitution. Whatever rules have been adopted and practiced by the civilized nations of the world in war to soften its harshness and severity, should be adopted and practiced by us in this war. That the laws of war authorized commanders to create and establish military commissions, courts, or tribunals, for the trial of offenders against the laws of war, whether they be active or secret participants in the hostilities, cannot be denied. That the judgments of such tribunals may have been sometimes harsh, and sometimes even tyrannical, does not prove that they ought not to exist, nor does it prove that they are not constituted in the interest of justice and mercy. Considering the power that the laws of war give over secret participants in hostilities, such as banditti, guerillas, spies, &c., the position of a commander would be miserable indeed if he could not call to his aid the judgments of such tribunals; he would become a mere butcher of men, without the power to ascertain justice, and there can be no mercy where there is no justice. War in its mildest form is horrible; but take away from the contending armies the ability and right to organize what is now known as a Bureau of Military Justice, they would soon become monster savages, unrestrained by any and all ideas of law and justice. Surely no lover of mankind, no one that respects law and order, no one that has the instinct of justice, or that can be softened by mercy, would, in time of war, take away from the commanders the right to organize military tribunals of justice, and especially such tribunals for the protection of persons charged or suspected with being secret foes and participants in the hostilities. It would be a miracle

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if the records and history of this war do not show occasional cases in which those tribunals have erred; but they will show many, very many cases in which human life would have been taken but for the interposition and judgments of those tribunals. Every student of the laws of war must acknowledge that such tribunals exert a kindly and benign influence in time of war. Impartial history will record the fact that the Bureau of Military Justice, regularly organized during this war, has saved human life and prevented human suffering. The greatest suffering, patiently endured by our soldiers, and the hardest battles gallantly fought during this protracted struggle, are not more creditable to the American character than the establishment of this bureau. This people have such an educated and profound respect for law and justice—such a love of mercy—that they have, in the midst of this greatest of civil wars, systematized and brought into regular order tribunals that before this war existed under the law of war, but without general rule. To condemn the tribunals that have been established under this bureau is to condemn and denounce the war itself; or, justifying the war, to insist that it shall be prosecuted according to the harshest rules, and without the aid of the laws, usages, and customary agencies for mitigating those rules. If such tribunals had not existed before, under the laws and usages of war, the American citizen might as proudly point to their establishment as to our inimitable and inestimable constitutions. It must be constantly borne in mind that such tribunals and such a bureau cannot exist except in time of war, and cannot then take cognizance of offenders or offences where the civil courts are open, except offenders and offences against the laws of war.

But it is insisted by some, and doubtless with honesty, and with a zeal commensurate with their honesty, that such military tribunals can have no constitutional existence. The argument against their constitutionality may be shortly, and I think fairly, stated thus:

Congress alone can establish military or civil judicial

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tribunals. As Congress has not established military tribunals, except such as have been created under the articles of war, and which articles are made in pursuance of that clause in the Constitution which gives to Congress the power to make rules for the government of the army and navy, any other tribunal is and must be plainly unconstitutional, and all its acts void.

This objection thus stated, or stated in any other way, begs the question. It assumes that Congress alone can establish military judicial tribunals. Is that assumption true?

We have seen that when war comes, the laws and usages of war come also, and that during the war they are a part of the laws of the land. Under the Constitution, Congress may define and punish offences against those laws, but in default of Congress defining those laws and prescribing a punishment for their infraction, and the mode of proceeding to ascertain whether an offence has been committed, and what punishment is to be inflicted, the army must be governed by the laws and usages of war as understood and practiced by the civilized nations of the world. It has been abundantly shown that these tribunals are constituted by the army in the interest of justice and mercy, and for the purpose and to the effect of mitigating the horrors of war.

But it may be insisted that though the laws of war, being a part of the law of nations, constitute a part of the laws of the land, that those laws must be regarded as modified so far and whenever they come in direct conflict with plain constitutional provisions. The following clauses of the Constitution are principally relied upon to show the conflict betwixt the laws of war and the Constitution :

“The trial of all crimes, except in cases of impeachment, shall be by the jury; and such trial shall be held in the State where the said crime shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.” (Art. III of the original Constitution, § 2.)

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"No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service, in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled, in any criminal case, to be witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation." (Amendments to the Constitution, Art. V.)

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and be informed of the nature and cause of the accusation; to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defence."—(Art. VI of the amendments to the Constitution.)

These provisions of the Constitution are intended to fling around the life, liberty, and property of a citizen all the guarantees of a jury trial. These constitutional guarantees cannot be estimated too highly, or protected too sacredly. The reader of history knows that for many weary ages the people suffered for the want of them; it would not only be stupidity but madness in us not to preserve them. No man has a deeper conviction of their value or a more sincere desire to preserve and perpetuate them than I have.

Nevertheless, these exalted and sacred provisions of the Constitution must not be read alone and by themselves, but must be read and taken in connection with other provisions. The Constitution was framed by great men, men of learning and large experience, and it is a wonderful monument of their wisdom. Well versed in the history

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of the world, they knew that the nation for which they were forming a government would, unless all history was false, have wars, foreign and domestic. Hence the government framed by them is clothed with the power to make and carry on war. As has been shown, when war comes, the laws of war come with it. Infractions of the laws of nations are not denominated *crimes*, but *offences*. Hence the expression in the Constitution that "Congress shall have power to define and punish \* \* offences against the law of nations." Many of the *offences* against the law of nations for which a man may, by the laws of war, lose his life, his liberty, or his property, are not *crimes*. It is an offence against the law of nations to break a lawful blockade, and for which a forfeiture of the property is the penalty, and yet the running a blockade has never been regarded a crime; to hold communication or intercourse with the enemy is a high offence against the laws of war, and for which those laws prescribe punishment, and yet it is not a *crime*; to act as spy is an offence against the laws of war, and the punishment for which in all ages has been death, and yet it is not a crime; to violate a flag of truce is an offence against the laws of war, and yet not a crime of which a civil court can take cognizance; to unite with banditti, jayhawkers, guerillas, or any other unauthorized marauders is a high offence against the laws of war; the offence is complete when the band is organized or joined. The atrocities committed by such a band do not constitute the offence, but make the reasons, and sufficient reasons they are, why such banditti are denounced by the laws of war. Some of the offences against the laws of war are crimes, and some not. Because they are crimes they do not cease to be offences against those laws; nor because they are not crimes or misdemeanors do they fail to be offences against the laws of war. Murder is a crime, and the murderer, as such, must be proceeded against in the form and manner prescribed in the Constitution; in committing the murder an offence may also have been committed against the laws of war;

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for that offence he must answer to the laws of war, and the tribunals legalized by that law.

There is, then, an apparent but no real conflict in the constitutional provisions. *Offences* against the laws of war must be dealt with and punished under the Constitution as the laws of war, they being a part of the law of nations, direct; *crimes* must be dealt with and punished as the Constitution, and laws made in pursuance thereof, may direct.

Congress has not undertaken to define the code of war nor to punish offences against it. In the case of a spy, Congress has undertaken to say who shall be deemed a spy, and how he shall be punished. But every lawyer knows that a spy was a well-known offender under the laws of war, and that under and according to those laws he could have been tried and punished without an act of Congress. This is admitted by the act of Congress, when it says that he shall suffer death "according to the law and usages of war." The act is simply declaratory of the law.

That portion of the Constitution which declares that "no person shall be deprived of his life, liberty, or property without due process of law," has such direct reference to, and connection with, trials for *crime* or *criminal* prosecutions that comment upon it would seem to be unnecessary. Trials for offences against the laws of war are not embraced or intended to be embraced in those provisions. If this is not so, then every man that kills another in battle is a murderer, for he deprived a "person of life without that due process of law" contemplated by this provision; every man who holds another as a prisoner of war is liable for false imprisonment, as he does so without that due process of law contemplated by this provision; every soldier that marches across a field in battle array is liable to an action of trespass, because he does it without that same due process. The argument that flings around offenders against the laws of war these guarantees of the Constitution would convict all the soldiers of our army of murder; no prison-



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Military Commissions.

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ers could be taken and held; the army could not move. The absurd consequences that would of necessity flow from such an argument show that it cannot be the true construction—it cannot be what was intended by the framers of the instrument. One of the prime motives for the Union and a federal government was to confer the powers of war. If any provisions of the Constitution are so in conflict with the power to carry on war as to destroy and make it valueless, then the instrument, instead of being a great and wise one, is a miserable failure, a *felo de se*.

If a man should sue out his writ of *habeas corpus*, and the return shows that he belonged to the army or navy, and was held to be tried for some offence against the rules and articles of war, the writ should be dismissed and the party remanded to answer to the charges. So in time of war, if a man should sue out a writ of *habeas corpus*, and it is made appear that he is in the hands of the military as a prisoner of war, the writ should be dismissed and the prisoner remanded to be disposed of as the laws and usages of war require. If the prisoner be a regular unoffending soldier of the opposing party to the war, he should be treated with all the courtesy and kindness consistent with his safe custody; if he has offended against the laws of war, he should have such trial and be punished as the laws of war require. A spy, though a prisoner of war, may be tried, condemned, and executed by a military tribunal without a breach of the Constitution. A bushwhacker, a jayhawker, a bandit, a war rebel, an assassin, being public enemies, may be tried, condemned, and executed as offenders against the laws of war. The soldier that would fail to try a spy or bandit after his capture would be as derelict in duty as if he were to fail to capture; he is as much bound to try and to execute, if guilty, as he is to arrest; the same law that makes it his duty to pursue and kill or capture makes it his duty to try according to the usages of war. The judge of a civil court is not more strongly bound under the Constitution and the law to try

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Military Commissions.

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a criminal than is the military to try an offender against the laws of war.

The fact that the civil courts are open does not affect the right of the military tribunal to hold as a prisoner and to try. The civil courts have no more right to prevent the military, in time of war, from trying an offender against the laws of war than they have a right to interfere with and prevent a battle. A battle may be lawfully fought in the very view and presence of a court; so a spy, a bandit, or other offender against the law of war may be tried, and tried lawfully, when and where the civil courts are open and transacting the usual business.

The laws of war authorize human life to be taken without legal process, or that legal process contemplated by those provisions in the Constitution that are relied upon to show that military judicial tribunals are unconstitutional. Wars should be prosecuted justly as well as bravely. One enemy in the power of another, whether he be an open or a secret one, should not be punished or executed without trial. If the question be one concerning the laws of war, he should be tried by those engaged in the war—they and they only are his peers. The military must decide whether he is or not an active participant in the hostilities. If he is an active participant in the hostilities, it is the duty of the military to take him a prisoner without warrant or other judicial process, and dispose of him as the laws of war direct.

It is curious to see one and the same mind justify the killing of thousands in battle because it is done according to the laws of war, and yet condemning that same law when, out of regard for justice, and with the hope of saving life, it orders a military trial before the enemy are killed. The love of law, of justice, and the wish to save life and suffering, should impel all good men in time of war to uphold and sustain the existence and action of such tribunals. The object of such tribunals is obviously intended to save life, and when their jurisdiction is confined to offences against the laws of war, that is their effect.

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Military Commisions.

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They prevent indiscriminate slaughter; they prevent men from being punished or killed upon mere suspicion.

The law of nations, which is the result of the experience and wisdom of ages, has decided that jayhawkers, banditti, &c., are offenders against the laws of nature, and of war, and as such amenable to the military. Our Constitution has made those laws a part of the law of the land. Obedience to the constitution and the law, then, requires that the military should do their whole duty; they must not only meet and fight the enemies of the country in open battle, but they must kill or take the secret enemies of the country, and try and execute them according to the laws of war. The civil tribunals of the country cannot rightfully interfere with the military in the performance of their high, arduous, and perilous, but lawful duties. That Booth and his associates were secret active public enemies no mind that contemplates the facts can doubt. The exclamation used by him when he escaped from the box on to the stage, after he had fired the fatal shot, *sic semper tyrannis*, and his dying message, "say to my mother that I died for my country," show that he was not an assassin from private malice, but that he acted as a public foe. Such a deed is expressly laid down by Vattel, in his work on the law of nations, as an offence against the laws of war, and a great crime. "I give, then, the name of assassination to a treacherous murder, whether the perpetrators of the deed be the subjects of the party whom we cause to be assassinated or of our own sovereign, or that it be executed by any other emissary introducing himself as a suppliant, a refugee, or a deserter, or, in fine, as a stranger." (Vattel, 339.)

Neither the civil nor the military department of the government should regard itself as wiser and better than the Constitution and the laws that exist under or are made in pursuance thereof. Each department should, in peace and in war, confining itself to its own proper sphere of action, diligently and fearlessly perform its legitimate functions, and in the mode prescribed by the Constitution

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Citizenship of Rebel Enemies.

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and the law. Such obedience to and observance of law will maintain peace when it exists, and will soonest relieve the country from the abnormal state of war.

My conclusion, therefore, is, that if the persons who are charged with the assassination of the President committed the deed as public enemies, as I believe they did, and whether they did or not is a question to be decided by the tribunal before which they are tried, they not only can, but ought to be tried before a military tribunal. If the persons charged have offended against the laws of war, it would be as palpably wrong for the military to hand them over to the civil courts, as it would be wrong in a civil court to convict a man of murder who had, in time of war, killed another in battle.

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

The PRESIDENT.

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CITIZENSHIP OF REBEL ENEMIES.

Citizens of the United States who resigned commissions in the navy of the United States and entered the rebel service did not lose their citizenship by becoming traitors, and if otherwise qualified, are competent to be officers of vessels of the United States.

ATTORNEY GENERAL'S OFFICE,

*August 12, 1865.*

SIR: I have the honor to say, in reply to your letter of the 7th instant, that, in my opinion, if the two persons to whom you refer as having resigned commissions in the naval service of the United States, and accepted employment in the rebel naval service, were born in the United States, or, if born in a foreign country, were or have been naturalized as citizens of the United States, are, if otherwise qualified, competent, according to the act of June 28, 1864, to be officers of vessels of the United States.

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Sales for Direct Taxes.

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If they were citizens before they engaged in the rebellion they did not lose their citizenship by becoming traitors. They became liable to suffer the pains and penalties which the law inflicts upon convicted traitors; but I am not aware that forfeiture of citizenship is one of the pains and penalties.

Belonging, as they do, according to the statement in your letter, to certain classes of traitors who have not been pardoned by the President, they are liable, at any time, to be tried, convicted, and punished for their treason.

Their conduct, and associations also, impressed upon them the qualified character of enemies, but did not destroy their inherent character as citizens, which, by birth or otherwise, they acquired.

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

Hon. HUGH McCULLOCH,

*Secretary of the Treasury.*

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SALES FOR DIRECT TAXES.

Property cannot lawfully be sold for direct taxes while in the custody of the marshal under proceedings for confiscation.

ATTORNEY GENERAL'S OFFICE,

*August 14, 1865.*

SIR: I have the honor to acknowledge the receipt of your letter of the 2d of August, wherein you ask me:

1st. Are sales of property made by direct tax commissioner, under the act of June 7, 1862, pending proceedings for the confiscation of such property, null and void, by reason of the existence of the proceedings for confiscations?

2d. If such sales are null and void, has the Secretary of the Treasury any power under the law to order the refunding of the money received for such property at the tax sales?

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Barrow Cotton.

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When proceedings are instituted for the confiscation of property, it is seized by the Government, and taken into the actual possession of the marshal. *Prima facie*, it is the property of the Government, and cannot be sold by any other officer, whilst it is thus in the marshal's possession. A sale by the tax commissioner of property legally in the custody of the Government, and which it claims title to, must therefore be null and void.

If the money paid by the purchaser at the tax sale has gone into the treasury, it cannot be drawn out except in pursuance of some act of appropriation.

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

Hon. HUGH McCULLOCH,

*Secretary of the Treasury.*

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BARROW COTTON.

1. There is no legal distinction between the case of the cotton claimed by David Barrow and the case of the Savannah cotton.
2. The criterion of a case of "captured" property within the meaning of the act of March 12, 1863, is the fact of actual and hostile seizure.

ATTORNEY GENERAL'S OFFICE,

August 14, 1865.

SIR: I have the honor to acknowledge the receipt of your letter of the 9th instant, transmitting the petition and proofs in the matter of the claim of David Barrow for the proceeds of the sale of one hundred and eighty-eight bales of cotton seized by the United States forces, commanded by General Sherman, in the State of Mississippi, and requesting me to say whether the claim is within the scope of the opinion which I gave your Department recently in the case of the cotton captured at Savannah.

The cotton, the proceeds of which you are requested to restore to Mr. Barrow, was seized in August, 1863, by

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Barrow Cotton.

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United States troops, on a plantation belonging to the claimant in Hines county, Mississippi. It appears that the claimant never resided on this plantation, and that at the time of the seizure, and previously thereto, he was domiciled in Louisiana, and engaged in the cultivation of his plantation in that State. I see no reason to doubt his ownership of the plantation in Mississippi, or of the cotton taken from it by our troops. It appears that on the 17th of September, 1863, about a month after the property was seized, he took an oath of allegiance to the United States, at Baton Rouge, but it does not appear that previously to the taking of the oath' he was engaged, in arms or otherwise, in aiding or encouraging the rebellion. I do not mean to say that I discover strong affirmative proof showing that he never aided or encouraged the rebellion, but simply that the evidence contained in the papers before me does not affirmatively show active disloyalty on his part. I presume that he must be accorded the benefit of the doubt. The plantation and the cotton in question seem to have been in the possession of his duly constituted agents at the time of the visit of the forces under General Sherman. They were present on the plantation and in the possession of the cotton, and engaged otherwise in the discharge of their duties when this seizure was made. I do not see, therefore, that the evidence before me would support an allegation that the present cotton was "*abandoned*" property in the sense of the act of July 2, 1864.

The cotton seems to have been transported by the military persons who seized it to Vicksburg, and by them shipped to a Treasury agent at Cincinnati, Ohio, who received and sold it, pursuant to the statute of March 12, 1863, and who now holds, I presume, the proceeds of the sale.

This is the outline of the case, as it is presented in the papers before me, and I must confess my inability to perceive any legal distinction between the facts of the present case and those of the case of the Savannah cotton, on which I have already pronounced my opinion. It is clearly a

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Barrow Cotton.

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case of "captured" property, within the meaning of the act of 1863, as I endeavored to interpret it in my former opinion.

The question is not whether the property was liable to capture under the general public law, or any municipal law, but the criterion is the fact of actual and hostile seizure. That fact is as conspicuous in this case as in the case of the cotton captured at Savannah by General Sherman. All the affidavits concur in stating that the property was actually and hostilely seized and taken out of the possession of the owner by a military force operating belligerently in an insurrectionary State. The character of the owner and the quality of the property, whether public or private, whether surrounded by suspicious circumstances or palpably free from any cloud of suspicion, either as to ownership or intended use, are circumstances which do not legally enter, in my opinion, into the consideration of the present question. The fact not only appears that the present property was "captured," in the sense of the statute, but also that it came into the custody of a Treasury agent, and was sold by him in that character. The proceeds in his hands are, therefore, the proceeds of captured property, which was "received and collected" by a duly authorized agent of the Treasury, and in respect to the money realized by the sale of the property, the mandate of the statute must be obeyed. The statutory command is that the proceeds of the sales of all property in this predicament "shall be paid into the treasury of the United States."

I am clear that the present case should be ruled by the doctrines announced in my previous opinion.

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

Hon. HUGH McCULLOCH,

*Secretary of the Treasury.*



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Provisional Government in Mississippi.

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## PROVISIONAL GOVERNMENT IN MISSISSIPPI.

The military authorities of the United States in the State of Mississippi, during the existence of the provisional government therein established by the President, had authority to arrest and imprison a citizen for crime, and hold him in disregard of a writ of habeas corpus issued by the judge of a court appointed by the provisional governor.

ATTORNEY GENERAL'S OFFICE,

*August 23, 1865.*

SIR: I have the honor to acknowledge the receipt of your letter of the 12th of August, together with two letters from the Hon. William L. Sharkey, Provisional Governor of the State of Mississippi, and a copy of the proceedings before D. O. Mervine, Esq., judge of the criminal court for Warren county, in the State of Mississippi.

The letters and copy of the proceedings show that a white man, by the name of Jackson, killed a negro man in Montgomery county, Mississippi, about fifty miles above Vicksburg. The military authorities at Vicksburg sent up a force, had Jackson arrested, brought to Vicksburg, and imprisoned. After advising with Governor Sharkey, Judge Mervine issued a writ of habeas corpus for Jackson, and General Slocum, the commander of the department, refuses obedience to the writ. Mervine held his office as judge by the appointment of Governor Sharkey.

Governor Sharkey complains, in his letter to you, of this conduct on the part of the military, says that there is not now, and has not been since the surrender of General Taylor, any armed opposition to the Government in Mississippi, and that it is an unwarranted and unconstitutional usurpation of power by the military.

In order to understand whether the complaints of the governor are well or ill-founded we must see:

First, With what powers the provisional governor is vested; and,

Second, What are the duties of the military in the State of Mississippi?

I. The President of the United States, under the autho-

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Provisional Government in Mississippi.

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ity in him vested by the Constitution of the United States, to see that the laws are faithfully executed, and in order to carry out and enforce the obligations of the United States to the people of Mississippi, in securing them in the enjoyment of a republican form of government, they, by their effort at revolution, having deprived themselves of all civil State government, appointed William L. Sharkey provisional governor of said State, making it his duty at the earliest practical period to prescribe such rules and regulations as may be necessary and proper for convening a convention composed of delegates to be chosen by that portion of the people of said State who are loyal to the United States, for the purpose of altering or amending the constitution thereof, and with authority to exercise within the limits of said State all the powers necessary and proper to enable such loyal people of the State of Mississippi, to restore said State to its constitutional relations to the Federal Government, and to present such a republican form of government as will entitle the State to the guarantee of the United States therefor, and its people to the protection of the United States against invasion, insurrection, and domestic violence. The military are required to aid the provisional governor in the performance of his duty to reorganize the State government. It will be perceived that the proclamation and authority to Governor Sharkey are based upon the principle that neither the Government of the United States, nor any department thereof, has the constitutional authority to make a constitution, nominate a convention or legislature, or make civil officers of any kind for the State of Mississippi. By the rebellion and treason of the people of the State, the State government and State officials had been brought into direct antagonism to the Federal Government. By the treasonable rebellion of the people of the State of Mississippi they had destroyed their State government, and placed the United States in the position that the Federal Government was bound to declare their late State organization a nullity, and all the State officials as without authority. But though the people of

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Provisional Government in Mississippi.

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Mississippi may by treason against the Federal Government destroy their own State organization, they cannot destroy the right of the loyal people of that State to organize and frame their own State government. The right of self government in a people is inalienable and indestructible. So long as the Constitution of the United States remains unchanged by one of the modes pointed out for its amendment, or is not destroyed by violence, the right of the people of a State to make their own constitution and laws and appoint their own officers must be acknowledged and recognized. The Government of the United States is bound to guarantee to each State a republican form of government. That guarantee cannot be fulfilled except by permitting the people to make their own constitution republican in form. Of course, the people of a State cannot be permitted to adopt a government, republican in form, but in direct antagonism to the Government of the United States. Such antagonism is forbidden by the Constitution of the United States, where it requires State officers to take an oath to support the Constitution of the United States, and when it declares that the Constitution of the United States and the laws made in pursuance thereof shall be the supreme law of the land.

The President of the United States having rightfully sent into Mississippi the armies of the United States to overcome and put down the organized armed force against the Government, when that was accomplished, properly declared the State to be without civil government, and appointed a provisional governor, with the simple and restricted power to give the loyal people a fair and full opportunity to make their own government.

There is an obvious and plain distinction betwixt the right and duty to organize a government and that of administering a government already organized.

The President regarded it a solemn duty as early as possible to do what he could to afford to the people an opportunity to make their own State government, and with the view of accomplishing that end, appointed the

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Provisional Government in Mississippi.

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provisional governor. He had no right to create courts and judges, and other civil officers for that State, and did not assume to do so, or to give authority to the provisional governor to do so. But Governor Sharkey has, as it appears from his letters, appointed judges of State courts. Such appointments have been made without direction from the Federal Government, and, as must be supposed, at the instance of the people of Mississippi, the governor trusting that the convention which is to assemble for the purpose of making a State government will make his acts legal. Considering such appointment of a judge by the provisional governor as an act suggested by the necessity of the case, and asked for by the people of the State because of the extremity in which they find themselves, the President hopes that good will come, as, no doubt, good was intended, by the appointment of such judges. Yet the President of the United States cannot recognize such courts as absolutely legal and authoritative, and cannot order and enforce obedience to the mandates of the judges thereof.

II. But lately the people of Mississippi were in armed organized hostility against the federal authorities and had treasonably usurped the State offices and government in aid of their rebellious purposes. Prudence in reference to an effort to renew the late rebellion, as well as a regard for the peace and quiet of the people of the State of Mississippi, requires that the army should not be withdrawn until a civil government, republican in form, and not antagonistic to the Federal Government, is established. During the period in which the people are without a State government it is the duty of the army to keep the peace. The peace cannot be kept without the power to punish for offences. The right to punish is necessarily incident to the duty to keep the peace. There are now no legal and constitutional administrative functionaries of government in Mississippi except the army. The army being in Mississippi for the purpose of suppressing the rebellion, must remain there and keep the peace until the loyal peo-

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Ransom, Salvage, and Bounty Money.

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ple of that State shall reorganize their State government, and the United States, as well as the State of Mississippi, shall be able to do by civil officers what now can only be done by the military authorities of the United States.

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

Hon. WM. H. SEWARD,

*Secretary of State.*

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DISTRIBUTION OF RANSOM, SALVAGE, AND BOUNTY  
MONEY.

The flag officer, fleet captain, and divisional commanders of a fleet, are respectively entitled to the same interest in ransom money, salvage, and bounty money, accruing to any vessel of the navy, being one of a fleet or squadron, that they would have in prize money in a like case.

ATTORNEY GENERAL'S OFFICE,

*August 24, 1865.*

SIR: In your letter of the 17th of August, you ask me whether, in carrying out the provisions of the last sentence of the 11th section of the "act to regulate prize proceedings," &c., approved June 30, 1864, the flag officer, fleet captain, and divisional commanders, are in my opinion entitled to share in the different distributions there enumerated?

The sentence to which you refer declares that "all ransom money, salvage, bounty, or the proceeds of condemned property, accruing or awarded to any vessel of the navy, shall be distributed and paid to the officers and men entitled thereto in the same manner as prize money, under the direction of the Secretary of the Navy."

In distributing any money derived from ransom, salvage, bounty, or the proceeds of condemned property, the Secretary of the Navy must dispose of it as though it was prize money. A doubt arises as to whether the officers named in your question can share in the money because of the language of the act "accruing or awarded to any

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Right of Absent Naval Officers to Prize Money.

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vessel of the navy." From these words it might be inferred that such moneys could only accrue and be awarded to the officers and men of a single vessel, and, as a consequence, unless the flag officer, fleet captain, or commander of a division happened to be an officer on that vessel they could not share in the distribution. That inference is removed by the after part of the sentence, when it says that the money "shall be distributed and paid to the officers and men entitled thereto in the same manner as prize money." The 10th section of the act prescribes the manner in which prize money is to be distributed when the capture was made by a vessel of a fleet or a squadron, or a single vessel. Though the money may accrue or be awarded to a "vessel of the navy," we must look to the 10th section to see who is "entitled" to it, and for the manner of its distribution.

It seems to me, then, to be the intention of the act to give to the flag officer, captain of a fleet, and divisional commander, the same interest in and share of ransom money, salvage, bounty, and proceeds of condemned property accruing or awarded to any vessel of the navy, that vessel being one of a fleet or squadron, as they would have in prize money in a like case.

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

Hon. GIDEON WELLES,

*Secretary of the Navy.*

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RIGHT OF ABSENT NAVAL OFFICERS TO PRIZE MONEY.

An officer of a fleet absent with leave from the command to which he is attached, for the purpose of attending to his private affairs, is not entitled to share in prizes captured during his absence.

ATTORNEY GENERAL'S OFFICE,

August 24, 1865.

SIR: I have the honor to acknowledge the receipt of your letter of the 22d of August, in which you ask me,

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Right of Absent Naval Officers to Prize Money.

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"whether under the provisions of the act to regulate prize proceedings," &c., approved June 30, 1864, "Commander Temple is entitled to share, as fleet captain of the East Gulf squadron, in captures made during the summer of 1864. Commander Temple was, on the 12th of May, 1864, given leave to go north for six weeks, with permission to apply for an extension, to attend his private affairs, but was authorized by Acting Rear Admiral Bailey, while in Washington, to attend to a certain duty. The leave of Commander Temple was twice extended by the Department at his own request and for private reasons, and he never rejoined the squadron. He claims to share under the provision that no officer or other person absent on duty shall be deprived of his prize money."

With your letter I received a letter from Commander Temple to you of date 27th of June, 1865, and a copy of the correspondence under and by which leave of absence was given to Commander Temple.

The 10th section of the act of June 30, 1864, declares what officers and seamen shall be entitled to share in prize money. It is manifest from that section that Congress intended none to share in the prize money except officers and men on duty at the time of the capture. But it is properly provided that a temporary absence on duty shall not deprive an officer or other person of the right to share in any prize money to which he would be otherwise entitled. But the person absent from the vessel at the time of the capture, must show that he was detailed for the duty that caused his temporary absence. An officer or seaman cannot obtain a leave of absence for his own private ends, and during his absence claim a share in the prizes then made. Equity would say that his fellow officers or seamen would as well share in the fortunate results of his private labors, as he to share in the prizes captured at their hazard and by their courage and skill.

Commander Temple was not detailed for duty that caused his absence; public interest did not demand his absence at the time of the captures in which he claims an

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Fees of District Attorney.

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interest. It seems to me very clear, that he cannot share in the captures made during the summer of 1864, and when he was absent on a leave sought by himself and for his own private purposes. The fact that he did, during his absence, attend to a certain matter of business pertaining to the fleet at the request or by the orders of Acting Rear Admiral Bailey, does not change the case. He was not detailed to do that business, nor does it appear that the detail of an officer from the fleet would have been necessary to have it attended to.

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

Hon. GIDEON WELLES,

*Secretary of the Navy.*

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FEES OF DISTRICT ATTORNEY IN DISCONTINUED REVENUE CASES.

Where a proceeding *in rem*, under the internal revenue laws, is directed to be discontinued on the payment by the claimant of the legal costs which have accrued, the district attorney is not entitled to charge, under the 11th section of the act of March 3, 1863, two per cent. on the value of the property.

ATTORNEY GENERAL'S OFFICE,

*September 1, 1865.*

SIR: You requested, in your letter of the 5th ultimo, my opinion on the question of the legality of the commission and fees respectively charged by the district attorney and marshal of the United States for the northern district of New York, in a certain proceeding *in rem*, instituted for the condemnation of one hundred and fifty barrels of high wines, seized for an alleged violation of a provision of the internal revenue law.

On the receipt of your communication I requested the district attorney to refer me to the statute under which the respective charges were made in this case; and delayed



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Fees of District Attorney.

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replying to your question until I received an answer to my communication from the law officer of the United States. I have his letter now before me, and am prepared to give my opinion on the question you present.

It seems that, after the libel was filed in this case, the Commissioner of Internal Revenue determined to abandon the proceeding, and requested the district attorney to release the property upon the claimants paying the legal costs which had accrued in the case. The district attorney claimed to be entitled to receive two per cent. commissions on the supposed value of the wines, amounting to \$252 26; and the marshal embraced in his bill of costs an item of commissions amounting to ninety-seven dollars.

I am of opinion that both those charges were erroneously made. Before the marshal was entitled to release the wines and abandon the custody of them, under his writ, it was necessary for the district attorney to discontinue the cause. When that officer entered his discontinuance he was entitled, under the act of February 26, 1853, to receive a fee of five dollars, and the marshal was entitled to be paid the fee provided by that statute for the service of the process and the custody of the property, but neither of the officers was entitled to charge or claim, under the arrangement between the claimant and the defendant, commission upon the value, real or supposed, of the property proceeded against.

There was no settlement or compromise of the case, as I understand the facts stated in the letter referred to me by you. The United States simply abandoned the prosecution, and the district attorney's duty and function were simply to effectuate the abandonment, and accomplish the restoration of the property, by entering a discontinuance of the proceedings. That was the only way in which the property could be released from judicial custody. When that service was performed the district attorney was entitled to receive his statutory fee therefor. If there had been no agreement with the claimant for the payment of costs, the United States would have been liable to the dis-

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Fees of District Attorney.

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district attorney for the fee provided by the act of 1853, for the discontinuance of a case. The claimant, under the agreement, was bound to pay no more and no less than the amount of that fee. The same remark may be made with reference to the marshal's bill. He should have demanded from the claimant only the amount he would have been entitled to receive, under the act of 1853, from the United States if the case had been abandoned without any agreement as to the costs.

The district attorney, I learn, computed his fees according to the 11th section of the act of March 3, 1863, (12 Stats., 740,) which entitles a law officer of the United States to two per centum on all moneys collected or realized in any suit arising under the revenue laws in which the United States is a party. I am not able to understand the reasoning by which the case in question could have been supposed to have been within this act, or by which its terms can be made to apply to that case.

The district attorney was evidently laboring under a very erroneous impression as to the agreement between the Government and the claimant, or with regard to the intention of the latter touching his compensation, when he assimilated his charge, in the present case, to the fee allowed to a district attorney in a revenue case in which money is collected and realized for the United States.

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

Hon. HUGH McCULLOCH,

*Secretary of the Treasury.*

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Holders of Stolen Treasury Notes.

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RIGHTS OF *BONA FIDE* HOLDERS OF STOLEN TREASURY NOTES.

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An innocent holder of a "seven-thirty" treasury note, transferable by delivery, which was stolen and transferred when past due, is entitled to payment, as against the party from whom it was stolen.

ATTORNEY GENERAL'S OFFICE,  
*September 4, 1865.*

SIR: I have the honor to acknowledge the receipt of your letter of the 19th of August, in which you state that sundry seven-thirty treasury notes, payable to ——— or order, and so transferable by delivery, have been presented for redemption by the holders, but are claimed by Brewster, Sweet & Co., from whom they were stolen. The question of ownership is before you for decision. In order to enable you to decide between the conflicting claimants, you propound to me the following questions for my opinion:

"First. The notes were past due when stolen and when purchased by the present holders. Messrs. Brewster, Sweet & Co., insist that, being past due, the purchaser took them subject to the right of a lawful owner, who has lost his possession by a larceny?

"The holders insist that the rule of law applicable to over-due commercial paper does not apply to Government securities, especially as this class of securities was still largely on the market, and had not in fact, as was publicly known, been dishonored. It is, also, insisted on the part of the holders that the provision contained in the 3d section of the act of June 30, 1864, (Laws of 1864, 219,) so extended the time of redemption as to make the rule relative to past-due securities inapplicable. That act authorized the conversion into six per cent. twenty-year bonds at any time within three months from the date of notice of redemption by the Secretary of the Treasury, which time had not elapsed?"

The only facts stated to me are:

1. That sundry seven-thirty treasury notes, transfer-

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Holders of Stolen Treasury Notes.

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able by delivery, have been presented by the holders for redemption.

2d. That the notes were stolen from Brewster, Sweet & Co.

3d. That they were past due when stolen.

Upon these facts my opinion is, that the notes are and must be regarded as the property of the holders.

The fact that the notes had been stolen does not destroy or, in the slightest degree, affect their transferable or negotiable quality. A transfer by delivery to an innocent party vests him with as perfect right to the notes after as before the theft.

Nor can I see that the fact of the notes being past due when stolen, and, of course, when obtained by the present holders, can affect their title. A purchaser of dishonored and past due negotiable paper generally takes it subject to any equities that the maker may have against it.

But this is not a question of equities between the maker and the holders, but of ownership between claimants. As the fact that the paper is due, or not due, does not affect the negotiable quality thereof, it is not perceived why the papers being past due should fling suspicion over the title of the holders.

Be that as it may, however, it seems to me that the legal question arising out of the facts stated is settled in the case of *Murray vs. Lardner*, in the Supreme Court of the United States, (2 Wallace, 110.) The Court, speaking of negotiable paper, says: "Suspicion of defect of title, or the knowledge of circumstances which would excite suspicion in the mind of a prudent man, or gross negligence on the part of the taker at the time of the transfer, will not defeat his title. That result can be produced only by bad faith on his part. The burden of proof lies on the person who assails the right claimed by the party in possession." Bad faith cannot be imputed from the facts stated.

"Second. The notes were issued, and so remained at the date of the larceny, payable — or order. On some of them Brewster, Sweet & Co., endorsed: 'Pay the Secre-

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National Currency Acts.

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retary of the Treasury for redemption, Brewster, Sweet & Co.' This indorsement has been extracted, but this fact was unknown to the present holders at the time of the purchase by them. An indorsement does not, I suppose, serve to vest the title in the indorsee of a security payable to bearer, and transferable by delivery, but would be a sufficient notice to a taker of the rights of the indorsee, to put him on his guard and defeat his claim as a purchaser in good faith and without notice. But this notice being removed from the note, did it still have any effect, and, if so, what?

As the facts stated in this question do not show bad faith on the part of the holders, they cannot affect the ownership of the paper. The holders must be regarded and treated as the rightful owners.

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

Hon. HUGH McCULLOCH,

*Secretary of the Treasury.*

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NATIONAL CURRENCY ACTS.

1. The provisions of the National Currency Act of June 3, 1864, (13 Stats., 99,) and the amendatory act of March 3, 1865, (*ibid.*, 484,) authorize the creation of banking associations without the right to obtain, issue, and circulate notes.
2. These acts, while limiting the aggregate amount of bank-note circulation authorized thereby, place no restriction, either expressly or impliedly, upon the aggregate amount of the capital of banks which may be organized thereunder.

ATTORNEY GENERAL'S OFFICE,

September 4, 1865.

SIR: I have the honor to acknowledge the receipt of your letter of the 26th August, 1865, in which you state that "the capital of the national banks to which certifi-

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National Currency Acts.

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cates, authorizing the commencement of banking business, have been issued, amounts to a sum sufficient to absorb the whole of the \$300,000,000 of circulation authorized by the law, if circulation should be issued to the banks in proportion to the capital of each, and in accordance with the percentage mentioned in the amendment to the 21st section of the national currency act, passed at the last session of Congress.

"I have now received an application for a bank, in which the parties in terms waive all claims to circulation under the law as it now stands, and ask me to issue a certificate authorizing the commencement of business upon deposit of the requisite amount of United States bonds. Under these circumstances, I desire the opinion of the Attorney General upon the following questions, viz:

"First. Whether I have a right to issue a certificate, authorizing the commencement of business to any association under the existing relation of the total capital of national banks to the limit fixed by law to the national bank note circulation; and

"Second. Whether or not, the parties to an organization, having in their articles of association and organization certificate, waived any claim to circulation under the law, they would be thereby estopped from claiming such circulation in the future."

The questions thus stated deeply concern the great business interests of the country, and I must be permitted to express my regret that questions of such moment to the commercial community cannot promptly have the benefit of a judicial and authoritative exposition.

The act upon the proper construction of which these questions arise, is entitled "An act to provide for a national currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," approved 3d June, 1864.

The title of an act generally gives with greater or less certainty the object to be obtained by the act. To find out the means or mode of attaining the proposed end, the

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National Currency Acts.

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body of the act must be looked to and all its parts carefully considered and compared the one with the other.

The act proposes to accomplish the desired object by the creation of banking associations or corporations.

A banking association may exist with or without the power to issue circulation. Banks without the right to issue circulation may be necessary agents in providing a national currency; they prevent banks of issue becoming monopolies, and thereby keep them from the untrammelled and wild course of business into which monopolists too easily fall. I do not think it can be justly said because they are not banks of circulation that therefore they cannot exist for the purpose contemplated by the act. But because banks of discount and deposit only might be important aids in providing a sound and safe national currency it does not follow that Congress, by the act, looked to and intended to make use of such aids. We must look carefully to the act, and to all parts of it, to see whether Congress intended to create banks of discount, deposit, and circulation only, or whether it also permits the creation of banks of deposit and discount without the right to issue circulation. The 5th and 6th sections of the act read as follows :

“ Section 5. *And be it further enacted*, That associations for carrying on the business of banking may be formed by any number of persons, not less in any case than five, who shall enter into articles of association, which shall specify in general terms the object for which the association is formed, and may contain any other provisions not inconsistent with the provisions of this act, which the association may see fit to adopt for the regulation of the business of the association and the conduct of its affairs, which said articles shall be signed by the persons uniting to form the association, and a copy of them forwarded to the Comptroller of the Currency to be filed and preserved in his office.

“ Section 6. *And be it further enacted*, That the persons

## National Currency Acts.

uniting to form such an association shall, under their hands, make an organization certificate, which shall specify,

“First. The name assumed by such association, which name shall be subject to the approval of the Comptroller.

“Second. The place where its operations of discount and deposit are to be carried on, designating the State, territory, or district, and also the particular county and city, town or village.

“Third. The amount of its capital stock, and the number of shares into which the same shall be divided.

“Fourth. The names and places of residence of the shareholders, and number of shares held by each of them.

“Fifth. A declaration that said certificate is made to enable such persons to avail themselves of the advantages of this act.”

It is very clear that these two sections do not require that all the corporations created thereunder shall be banks of issue. On the contrary, the language of these sections is such that, if we look to them alone, or rather, if the language of those sections is not restricted or inconsistent with other portions of the act, it is palpably within the power of the Comptroller and the corporators to determine whether the bank shall be one of issue or not. The associates may make their banking powers as broad or as limited as they and the Comptroller may agree upon, provided such powers, broad or limited, are not inconsistent with the provisions of the act.

Let us see, then, whether there are any provisions of the act inconsistent with the exercise of such power in the corporations and the Comptroller.

The 8th section of the act makes the association a body corporate from the date of the certificate, but prohibits its doing any banking business until authorized by the Comptroller of the Currency. The 8th section then proceeds to declare that the “association shall have power to adopt a corporate seal, and shall have succession by the name designated in its organization certificate, for the period of twenty years from its organization, unless sooner dissolved



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according to the provisions of its articles of association, or by the act of its shareholders owning two-thirds of its stock, or unless the franchise shall be forfeited by a violation of this act; by such name it may make contracts, sue and be sued, complain and defend, in any court of law or equity, as fully as natural persons; it may elect or appoint directors, and by its board of directors appoint a president, vice-president, cashier, and other officers, define their duties, require bonds of them, and fix the penalty thereof, dismiss said officers, or any of them, at pleasure, and appoint others to fill their places, and exercise under this act all such incidental powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt, by receiving deposits, by buying and selling exchange, coin and bullion; by loaning money on personal security; by obtaining, issuing, and circulating notes according to the provisions of this act; and its board of directors shall also have power to define and regulate by by-laws, not inconsistent with the provisions of this act, the manner in which its stock shall be transferred, its directors elected or appointed, its officers appointed, its property transferred, its general business conducted, and all the privileges granted by this act to associations organized under it shall be exercised and enjoyed and its usual business shall be transacted at an office or banking house located in the place specified in its organization certificate."

There is ground for saying that the word "*banking*," as used in the 5th section of the act is defined in the 8th section, and that the "*obtaining, issuing, and circulating notes*" constitutes a part of the *banking* business contemplated in the 5th section; that the associations organized under the 5th section, for "*carrying on the banking business*," must have such banks as are defined in the 8th section, and if they carry on the business so defined they must be banks of issue. At first blush, this would seem to be the case, but it seems to me that a more careful reading of the section will not admit of such an interpretation.

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The recitation of the incidental powers necessary to carry on the banking business, in which recital is contained the power to "obtain, issue, and circulate notes," is rather a limitation upon the ordinary powers of a general banking business than a definition; it is a declaration that the corporations created under the act shall not exercise banking powers other than those enumerated, and not a declaration that the banks shall and must have each and all of the powers therein enumerated. The incidental powers mentioned in the act can alone be conferred, and none other; but it is not necessary to confer upon each bank all the incidental powers—all may be given, or a part only. Cannot the power and right to deal in coin or bullion, or promissory notes, or the loaning of money, be withheld and the other banking privileges conferred? And if these powers, or any of them, can be withheld, (and I do not see why they cannot,) it is also competent to withhold the power to obtain, issue, and circulate notes. I lay no stress upon the following language of section 8: "And all the privileges granted by this act to associations organized under it, shall be exercised and enjoyed," because its whole force and effect result from mispunctuation. With proper punctuation the semicolon would be after the word "conducted," and then it would read, "and all the privileges granted by this act to associations organized under it shall be exercised and enjoyed, and its usual business shall be transacted at an office or banking-house located in the place specified in its organization certificate." Next, the 21st section, as amended by the act, approved 3d March, 1865, would seem, upon a casual reading, to favor the notion that none but banks of issue could be created under the act. If it could not be insisted that the 8th section limited or qualified the power to create banking corporations, as given in the 5th and 6th sections, there would be little pretence for saying that the 21st section does. The 21st section certainly does not in terms restrict or limit any powers theretofore declared in the act, and it is manifest that no such purpose was intended by the in-

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troduction of that section. It may be contended, however, that this section shows that I have given an improper construction to the 8th section. The peculiar language of the 21st section shows that it was impressed on the makers of the law that no banks except banks of issue could be created. Let us consider this view.

The object of the section was to fix a rule by which the Comptroller of the Currency should be governed in distributing circulating notes amongst the corporations created under the act. It is but fair to regard that the mind of the draftsman and of the legislature in framing this section, was chiefly occupied in determining what should be the rule of distribution, and yet was thoughtful not to interfere with the general purposes and harmony of the bill. To understand and rightly interpret the 21st section, then, its prime object should be constantly borne in mind, and the makers of it credited with all proper care in regard to any interference with the general powers and harmony of the act.

The section provides, "That upon the transfer and delivery of bonds to the Treasurer, as provided in the foregoing section, the association making the same shall be entitled to receive from the Comptroller of the Currency circulating notes of different denominations, \* \* \* \* but not exceeding ninety per centum of the amount of said bonds at the par value thereof; \* \* \* and the amount of such circulating notes to be furnished to each *association shall* be in proportion to its paid-up capital, as follows, and no more: To each association whose capital shall not exceed five hundred thousand dollars, ninety per centum of such capital; to each association whose capital exceeds five hundred thousand dollars, but does not exceed one million dollars, eighty per centum of such capital; to each association whose capital exceeds one million dollars, seventy-five per centum of such capital; to each association whose capital exceeds three millions of dollars, sixty per centum of such capital."

Bearing it in mind that this section was introduced .

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order to give a rule for the distribution of notes amongst associations, it is easily understood; but cut loose from that idea, and it jars and conflicts with itself and with other parts of the statute. It conflicts with itself by permitting, in the first part of the section, an association entitled to receive notes to say what sum it will receive, "*not exceeding ninety per centum of the amount of said bonds at the par value thereof;*" when, in the second part thereof, it declares "the amount of such circulating notes to be furnished to each association *shall be in proportion to its paid-up capital.*"

Here there seems to be a plain contradiction, inasmuch as the first branch of the section leaves it discretionary to take, or not, notes to the amount of ninety per centum of the bonds delivered, and the second is imperative that each association shall be furnished with notes in proportion to its paid-up capital, and the second branch of this section would seem to be in direct conflict with the 16th section of the act, as well as in conflict with the first branch of the same section. The 16th section requires that each association shall constantly keep on deposit with the Treasurer, bonds of the United States of value equal to one third of the capital actually paid in. Congress did not intend to interfere with that requirement, by making it greater or less by anything contained in the 21st section, and yet the language of the second branch above quoted imports either that bonds must be deposited of value equal to the whole capital paid in, or that notes shall be furnished to the associations upon paid-up capital without a deposit of the bonds. As it is plain that there was no intention to interfere with the provisions of the 16th section by anything contained in the 21st section, so it is equally plain that there was no intention to limit or restrict the power to create a bank with or without the right to have circulating notes. Much of the difficulty in giving construction to this section, so as to make it in harmony with the other parts of the act, seems to me to grow out of the fact that affirmative words have been used when negative words would have been more apt. The rule to be deduced from

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the section is, that no bank shall have a right to more than ninety per centum in notes upon the par value of the bonds deposited with the Treasurer, and that in proportion as the capital of the bank increases, the per centum of notes diminishes; the whole amount of capital in either case being deposited in bonds. A bank of one hundred thousand dollars can have ninety per centum on the bonds in circulating notes, when a bank of three millions of dollars can only have sixty per centum.

I have selected the 8th and 21st sections of the act as those which seem most directly to conflict with the idea of creating a bank without the right to issue notes. There are many other passages in the act, which, upon a cursory reading, favor the notion that all the banks must be banks of issue; but all those passages are much easier of explanation than those upon which I have commented. It might be, however, that, though each particular passage can be explained, the impression made by the whole of them, when aggregated, cannot. That no conclusion against the creation of banks of discount and deposit only can be drawn from the whole statute, seems clear for the following reasons:

1st. There is a limitation upon the amount of circulating notes that may be issued, viz, \$300,000,000, and no limitation upon the banking capital. When the act contains no limitation upon the amount of capital that may be incorporated under it, and there is a limitation upon the amount of circulation, it would seem to follow that the banking capital might be in excess of the amount necessary to furnish the circulation up to the prescribed limit. It cannot be said, however, that it necessarily follows that because there is no express limitation upon banking capital in the act, there is therefore none by implication; or that the limitation upon the issue of notes is not itself a limitation upon the capital. But the journals of Congress show that there was a direct proposition to put a limitation upon the capital to be incorporated, as upon the notes to be issued, and it was voted down. The Senate inserted a

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limitation upon the capital, the House voted it down, and upon a committee of conference the Senate receded. From the refusal to put into the act this direct proposition to limit the capital to be incorporated, it is fairly to be inferred that Congress did not understand there was an implied limitation. This statute is a highly important one, and this question of limitation of capital one of its most important features, and it would be dealing unfairly by Congress to make them by construction and implication do that which was directly refused.

2d. The act provides for the increase of the capital of associations from time to time, when desired, and prescribes the mode by which such increased capital may be incorporated. There is no pretence for saying that banks that have been incorporated cannot increase their stock because the full amount of notes are in circulation. Now, if an association already in being can increase its capital without the right "to obtain, issue and circulate notes" to any greater extent than existed before such increase, why cannot new banks be created without such right?

3d. By the 7th section of an act entitled "An act to amend an act entitled 'An act to provide internal revenue to support the Government, to pay interest on the public debt, and for other purposes,' approved June 30, 1864," approved March 3, 1865, it is enacted that "any existing bank organized under the laws of any State, having a paid-up capital of not less than seventy-five thousand dollars, which shall apply before the first day of July next for authority to become a national bank, under the act entitled 'An act to provide a national currency, secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof,' approved June 3, 1864, and shall comply with all the requirements of said act, shall, if such bank be found by the Comptroller of the Currency to be in good standing and credit, receive such authority, in preference to new associations applying for the same."

By the previous section of the act, a tax so heavy was

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imposed on State banks as would force them to organize under this act. Or, if not an effort to force them to give up their State charters, it certainly was a very direct and persuasive invitation for them to do so, and to organize under the national currency act. This act shows that Congress did not regard that there was any limitation upon the amount of capital that might be incorporated for the banking business, and all are invited, whether they are banks of issue or only banks of discount and deposit, to give up their State charter and organize under this act.

I am therefore of opinion, that, although the limit of the currency is full, banks may be created without the right to obtain, issue and circulate notes.

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

Hon. HUGH McCULLOCH,

*Secretary of the Treasury.*

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LANDS PURCHASED BY THE UNITED STATES AT DIRECT  
TAX SALES—JURISDICTION OF FREEDMEN'S BUREAU.

The direct tax commissioners are not required to give the Freedmen's Bureau possession of any lands purchased for the United States at direct tax sales, which are subject to redemption under the law, and the Commissioner of the Bureau has no authority to set apart those lands, or any of them, for the uses mentioned in the statute of March 3, 1863.

ATTORNEY GENERAL'S OFFICE,

*September 6, 1865.*

SIR: It is stated in your letter of the 24th ultimo, that an officer of the Freedmen's Bureau has made requisition on the direct tax commissioners for South Carolina for certain tracts of lands purchased for the United States at direct tax sales, made in pursuance of the statutes regulating the collection of direct taxes in insurrection districts. (Acts June 7, 1862, 12 Stats., 422; February 6, 1863, *Ibid* 640; March 3, 1865, 13 *Ibid*, 501.)

The first and most important question stated for my

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consideration, in view of the demand of this officer, is, whether the tax commissioners are required to give the bureau for the relief of freedmen and refugees possession of lands purchased for the United States at tax sales, and which are yet subject to redemption under the statutes regulating the collection of direct taxes in insurrectionary districts?

Certainly, if such lands are within the jurisdiction of the bureau, and may be appropriated by it for assignment and sale to persons of the class over which it exercises control, it is the duty of the tax commissioners to give that bureau possession of the lands, when it may require them for the purposes mentioned in the statute by which it was established, and which defines its authority and duty.

The real question for consideration, therefore, is, whether the act of March 3, 1863, does confer authority on the commissioner to set apart for the use of refugees and freedmen, lands within an insurrectionary State, which have been purchased at direct tax sales for the United States, and which are liable to be redeemed within the time limited by the statute?

The first remark I make is, that I do not see how we can hold that any lands bid in by the United States at these sales are liable to be taken by the Freedmen's Bureau, before the time for their redemption has expired, without assuming that Congress intended, in the case of all lands of this description which that bureau might desire to appropriate, to take away from their owners the right of redemption, absolutely conferred upon and guaranteed to them by the statute under which their property was sold.

The second remark I make is, that I do not think that such an intention should be attributed to Congress, unless we are constrained to adopt that view of its meaning by the imperative force of the language employed.

I observe, in the third place, that I do not find in the 4th section of the act of March 3, 1863, which confers the whole of the jurisdiction possessed by the Freedmen's



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Bureau over lands in insurrectionary States, any words which constrain me to hold that Congress intended to confer on that bureau the power to annul, in the case of all lands in a southern State, sold for direct taxes and bid in by the United States, which the bureau might choose to appropriate, the right of redemption, which by every statutory provision on the subject of the collection of direct taxes in these States, is recognized as an equity vested in the owners during the time limited for redemption.

The three foregoing propositions seem to me, as I am at present advised, to solve the present question. They need but few words in their support. By all the legislation regulating the sale of property in these States for direct taxes, general, uniform, and just provision is made to enable owners of property forfeited for non-payment of the taxes to redeem these lands from sale under certain prescribed conditions and limitations.

The purchasers at the tax sales, whether private individuals or the United States, take titles subject to this equity of the owners, and which may be liable to be defeated whenever the owners, or other proper persons, within the time limited by law, shall appear before the respective boards of tax commissioners, and shall be allowed, on compliance with the statutory conditions, to make redemption of their property from sale.

Let us see now what will become of this equity if the Commissioner of the Freedmen's Bureau is authorized by the statute of March 3, 1863, to distribute such lands among persons subject to his jurisdiction, before the times limited for their redemption expire.

Not more than forty acres of land, set apart for the use of loyal refugees and freedmen, the statute provides, may be assigned to every male of those classes of persons, and every person to whom an assignment of land may be made, the statute declares, "*shall be protected in the use and enjoyment of the land for the term of three years at an annual rent.*" The act further provides, that "at the end of said term, or at any time during said term, the occu-

pants of any parcels so assigned, may purchase the land, and receive such title thereto as the United States can convey, upon paying therefor *the value of the land.*" (13 Stats., 508.) For a period of three years, therefore, the assignee of any land within the jurisdiction of the Freedmen's Bureau is protected in its use and enjoyment against all the world, and at the end of, or at any time before the end of that term, he is guaranteed the right of purchase on paying for the land assigned to him, its value. Any one can see that Congress could not have intended that such disposition should be made of the lands to which the United States may have acquired defeasible title under direct tax sales, before the term of redemption has passed, without intending to abrogate, whenever such land should be appropriated by this bureau, every provision of the law touching its redemption from sale. I have already remarked that I should require very strong words, expressive of such an intention, before I should be inclined to hold that it was the design of the legislature to work such a result; and that the language of the act of 1863 does not constrain me to adopt that view of the intention of Congress.

I have on several occasions, in giving opinions on questions arising out of this Freedmen's Bureau act, deplored the vagueness and indefiniteness which characterize the language of the statute. Effect cannot be given to the literal import of the words of the 4th section without attributing to Congress an intention to place in the power of the Freedmen's Bureau, all lands in the insurrectionary States which the United States may have at any time acquired by purchase—all lands appurtenant to the custom-house, mints, arsenals, navy-yards and wharves, which the Government owned in the cities of these States when the rebellion broke out, and which have come into use again, now the authority of the Government is restored throughout the South. Congress, perhaps, had the power to give all such property to loyal refugees and freedmen, as it had the power to take away from the owners of land

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sold for direct taxes, the equity of redemption. But we are not to assume that Congress intended to exercise its power in one case or the other, to the extent indicated, without clear evidence of such a purpose on the face of the statute.

I am of opinion that the tax commissioners for an insurrectionary State are not bound to give the Freedmen's Bureau possession of any lands purchased for the United States at direct tax sales, and which are yet subject to redemption under the law.

In reply to your second question, I remark that the opinion just given is intended to apply generally to all lands struck off to the United States at sales for direct taxes, whether purchased without reference to any specific purpose, or bid in under the direction of the President, to be used for war, revenue, charitable, educational, or police purposes. Before the periods for the redemption of such lands expires, I hold that the Commissioner of the Freedmen's Bureau has no authority to set them, or any of them, apart for the uses mentioned in the statute of 1863.

I believe that the opinion just expressed renders it unnecessary for me or you to determine what is intended to be asked in the third and last question stated in your letter, which are copied from the letter of the officer of the Freedmen's Bureau that suggested your communication to me.

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

Hon. HUGH McCULLOCH,

*Secretary of the Treasury.*

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Compensation of Counsel,

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## COMPENSATION OF COUNSEL EMPLOYED BY THE GOVERNMENT.

In the case of an account for professional services in the investigation of the title of land purchased by the Government, presented by counsel employed to examine and give an opinion on the title, the proper criterion for determining, in the absence of express contract, the reasonableness of the account, is the charge made in cases of like magnitude by lawyers of ability and reputation, or, if no such cases have occurred, the amount which lawyers of learning, ability and reputation, equal to the duty, would charge for similar services.

## ATTORNEY GENERAL'S OFFICE,

*September 12, 1865.*

SIR: In answer to your question whether the charge of Mr. Lowrey of \$9,638 61, for professional advice and disbursements in the matter of the title to the custom-house property in New York, is in my opinion just and reasonable, I have the honor to state that I have examined the abstract of title submitted by Mr. Lowrey. The work was very thoroughly and well done. I have no personal experience by which I can form an opinion as to what it would cost in time, trouble and labor, to make such an abstract, nor is there any evidence before me in relation thereto. I take it for granted, however, that as to the mere cost of manual labor there can be no room for difference of opinion. The actual expenses are doubtless properly charged.

The real point of difficulty must be upon that part of the charge which is purely for professional services. I practiced law in an interior city, which is but a village compared to New York; looking at the charge from the stand point of my professional experience, it certainly is too large. But to decide, or form an opinion, from my own practice, or anything that I had known in the field of my practice, would absolutely be wrong. The matter should be decided upon the testimony of gentlemen of the legal profession engaged in that business in New York.

Professional gentlemen of New York should be called on to state what it is worth to have such an abstract of title properly made and to give a legal opinion thereon.

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Compensation of Counsel.

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Such an inquiry could be answered either by reference to a customary rule, which must be presumed to be known to both parties, or by a personal knowledge and estimate of the value of the services and opinion.

If a customary rule is referred to and relied upon, it must be shown to be so general and universal as to have been known to both parties, or rather that either party could upon inquiry have been readily informed thereof.

There are two letters before me, one from Benjamin D. Silliman, Esq., and one from G. R. J. Bowdoin, Esq., both gentlemen of high personal character and first rate professional reputation. Mr. Silliman says that he understands the rule to be, that the charge for such an opinion is generally one per cent. Mr. Bowdoin says that the rule varies according to circumstances from one half to one per cent. He does not say what the circumstances are that vary the charge, whether the increase of labor, or the great or small value of the property. Every lawyer knows that the small or great value of the property does not make the title less or more intricate. My own experience is, (and I suppose it is the same with most lawyers,) that it is, generally, much easier to trace and ascertain the title to property of great value than that of inconsiderable value; persons owning property of great value look with care to the title and can readily refer to the muniments, and it is common to be neglectful of the title and muniments of that which is of little value. Left then without aid to say what circumstances vary the charge, I would suppose that the value of the property should do so; because the labor is likely to be less and the compensation greater. Pecuniary responsibility often becomes so great with a lawyer that it amounts to nothing, practically; in most cases, the lawyer has nothing at stake but his professional reputation. And often his reputation, great as it may be, is staked in cases of little importance or value to his client. I do not mean to say that because a lawyer's reputation is as often at stake in a small as a great cause, that he is therefore to charge in them alike.

Compensation of Counsel.

The value of the services in a pecuniary point of view to the client, may well constitute an element in the circumstances that vary the charge; but that element alone should not be permitted to reduce the charge to great inadequacy, or make enormous disproportion.

But looking at the letters of Messrs. Silliman and Bowdoin, I cannot say that there is any fixed rule of compensation for such services in New York. Certainly no such rule, as that the person employing a lawyer could upon inquiry know what he would have to pay for such lawyer's services. It does not appear that there was any rule so fixed and generally understood that a lawyer could not, without the loss of professional standing, have agreed to do the work for a sum greater or less than either one or one half of one per cent.

I have not the facts upon which I can say whether lawyers of learning, ability, and reputation, equal to the duty, would not have done the work for a less sum. Mr. Bowdoin says that one per cent. should be charged in this case, because a broker would get that sum. Such a rule cannot be followed, because a broker's charge may rest upon a positive contract, or a usage that amounts to a contract. In Mr. Bowdoin's estimation, lawyers should get as much as brokers, and should make similar contracts or establish a like usage. His estimate of what lawyers should charge and what should be the usage, is a very different thing from what they do charge, and what they do receive for their services.

Mr. Silliman's letter shows that his idea of the value of the services is controlled by the rule of one per centum upon the value, which he regards as an existing rule in New York; whereas it has not been satisfactorily shown that there is such a usage.

I apprehend that the title to property of such great value, \$1,000,000, has been examined so infrequently that no usage can be shown, and probably very few charges for such services have accrued. If there have been examinations of title to property, in cases of like value, or prox-

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Trade Marks.

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imately of like value, what was the charge made by lawyers of ability and reputation; and in the event that like cases cannot be cited, then what would lawyers of learning, ability, and reputation, equal to the duty, perform the same work for? These gentlemen cannot be censured from any facts before me. Of course, I am not competent to say, from the want of evidence, whether the charge is just and reasonable.

I have no doubt that the gentleman presenting this charge considers it reasonable and fair; but you cannot, sir, pay out the public money intrusted to you upon his judgment alone, nor can I advise you to do so.

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED

Hon. HUGH McCULLOCH,

*Secretary of the Treasury.*

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TRADE MARKS.

State legislation on subject of trade-marks noticed.

ATTORNEY GENERAL'S OFFICE,

*September 13, 1865.*

SIR: I have the honor to acknowledge the receipt of your letter of the 9th instant, stating that the Austrian Minister has applied to your Department for a copy of the "laws existing in the United States for the protection of the marks of trade and industry," and asking me to acquaint you with the date of such laws, if any have been enacted, in order that you may comply with the request of the minister.

The Congress of the United States has never passed any statute for the preservation of the use of names, marks, letters, or other indicia of a tradesman, by which to pass off goods to purchasers, as the manufacture of that tradesman, when they are not so. Whether the legislatures of the several States have enacted laws of this character,

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Trade-Marks.

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is a question which could only be answered after a careful examination of the statute books of the thirty-six different States composing the Federal Union. I know, however, that in many of the States special statutes have been passed to protect the rights of persons in respect to trade-marks. In Pennsylvania, by the 173d section of the act of 31st March, 1860, the forgery or counterfeiting of any representation, copy, or imitation of the private stamps, wrappers, or labels usually affixed by any mechanic or manufacturer to, and used by him on, or in the sale of any goods or wares, with intent to deceive or defraud, is a misdemeanor, and the guilty party may be punished by fine and imprisonment. By the same statute, having possession of dies, plates, engravings, or printed labels of the foregoing character, with intent to use or sell the same, also, the vending of goods fraudulently marked with forged or counterfeit stamps, are criminal acts, punishable with fine and imprisonment.

These enactments of the Legislature of Pennsylvania may be found in Purdon's Digest, by Stroud and Brightly, Ed. of 1857, pp. 1367, 1368.

The provisions of the statutes of New York on the same subject are substantially the same as those of her sister State, to which I have referred. They are contained in vol. 2 of the Revised Statutes of the State of New York, 1852, p. 880. The statute there cited is the act of 1850, ch. 123, secs. 1, 2, and 3.

In the State of Massachusetts, the unauthorized use of trade-marks entitles any party aggrieved to recover in a personal civil action all the damages incurred. The statutory provisions in that State on this subject are found in ch. 56 of the General Statute of Massachusetts, (1860.)

The foregoing is a brief summary of the written law on this subject by the three more important commercial and manufacturing States of the Union. Whether other and later legislation than that I have referred to exists in those States, I am not aware, and have no means of ascertaining.

But without, and independently of, special statute in all



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Internal Revenue Tax on Sales.

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the States of the Union, I believe there exists general unwritten law, which defines the rights and duties of persons in respect to the use of these indicia of trade, and under which, a person who may use the marks by which the goods of another are designated, may be liable to be restrained from making use of such marks, and also to compensate the party aggrieved for the damages he may have sustained. The courts of equity and of law have frequently in most, if not all, of the States, upheld by their decisions the exclusive rights of parties owning trade-marks to use them without interference on the part of others.

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

Hon. WM. H. SEWARD,

*Secretary of State.*

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## INTERNAL REVENUE TAX ON GOVERNMENT SALES.

The 98th section of the Internal Revenue Act of June 30, 1864, imposes tax on sales at auction of government property.

ATTORNEY GENERAL'S OFFICE,

*September 14, 1865.*

SIR: You state in your letter of the 9th instant, that the commandant of the navy-yard at Mound City has asked the Department whether "district collectors can demand revenue tax of government sales at that yard."

On this question you desire my opinion.

I suppose the sales referred to are sales at auction, and the revenue tax mentioned is that imposed by the 98th section of the act of June 30th 1864, (13 Stats., 273,) on sales of goods, wares, and merchandise at auction, whether made by an auctioneer or any other person.

The provision of that section of the statute to which I have referred, is as follows: "There shall be levied, collected, and paid on *all sales* of real estate, goods, wares, merchandise, articles, or things at auction, a duty of one-

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Internal Revenue Tax on Sales.

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fourth of one per centum on the gross amount of such sales; and every auctioneer or other person making such sales as aforesaid, shall at the end of each and every month, or within ten days thereafter, make a list or return, &c., and shall at the same time, as aforesaid, pay to the collector or deputy collector the amount of duty or tax thereupon, as aforesaid."

I cannot doubt that under this clear and explicit legislation every auctioneer or other person making sales of government property, must pay a duty of one-fourth of one per centum on the gross amount of such sales.

The proviso of the section renders this conclusion still more certain, for it excepts from the general provision sales by judicial or executive officers making auction sales by virtue of judgments or decrees of courts, and also public sales made by guardians, executors, or administrators, but does not except sales of property belonging to the Government. *Expressio unius est exclusio alterius.*

I have no doubt that Congress, if its attention were called to this case, and it were thought of sufficient importance, would except it also from the operation of the general provisions of the law, for when the tax is paid on sales of government property, money is but taken from the treasury to be returned there immediately; but so long as the law is written as I suppose it is, it must be obeyed.

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

Hon. G. V. Fox,

*Acting Secretary of the Navy.*

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Case of Mrs. Johns.

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## CASE OF MRS. JOHNS.

The property of that lady is liable to confiscation, unless relieved therefrom by operation of a pardon granted by the President.

ATTORNEY GENERAL'S OFFICE,  
*September 14, 1865.*

SIR: Through the Adjutant General, by letter of date August 28, 1865, you inform me that Bishop Johns, of Virginia, married a widow owning an estate in Norfolk of more than twenty thousand dollars in value. It is real estate, and the title is in her. When the rebellion broke out they resided in Norfolk. Upon the capture of that place by the Federal forces, they fled, leaving the property in the hands of an agent. The property was taken by the United States military, and is yet occupied by the quartermaster's department.

Bishop Johns and his wife, after the surrender of the confederate forces, returned to Norfolk, took the oath of amnesty, and now demand the property.

Upon these facts the following questions are asked :

1st. Should this property be turned back to Mrs. Johns, or over to the Freedmen's Bureau ?

2d. Does Mrs. Johns need the President's pardon ?

3d. And, if so, and pardoned, is she then fully entitled to her property ?

I. The facts above stated show that Bishop and Mrs. Johns are traitors. When the rebels, with a treasonable intent, took possession of, and asserted and exercised dominion in Norfolk, they did not, as was their duty, fly from the place and seek the protection of the Government; but when the Government sent forces there to establish its authority, and to give protection and freedom to the loyal citizens, they fled with the rebels. Instead of rejoicing, as good and loyal citizens of the old Government, they turned their backs upon it, and gave to rebels and traitors all the aid in their power, which was sympathy, countenance, and confidence. Their conduct shows that the

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Case of Mrs. Johns.

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treasonable government of the confederacy had their allegiance; and, as a compensation for that allegiance, they looked to it for protection. They are as guilty of treason as those who were able and did actually take up arms.

Being unpardoned traitors, of course the military need show no favors in surrendering the property. But if the military has no further use for the property, it is subject to be proceeded against for confiscation; and, if no such proceeding is instituted, it will, of course, go into the possession of Bishop and Mrs. Johns.

In the act of Congress entitled "An act in addition to the several acts concerning commercial intercourse between loyal and insurrectionary States, and to provide for the collection of captured and abandoned property, and the prevention of frauds in States declared in insurrection," approved July 2, 1864, it is enacted, "that all property, real or personal, described in the acts to which this is in addition, shall be regarded as abandoned where the lawful owners thereof shall be voluntarily absent therefrom, and engaged, either in arms or otherwise, in aiding or encouraging the rebellion."

Property cannot be regarded as abandoned, according to the provisions of this act, unless the party is voluntarily absent therefrom, and engaged, either in arms or otherwise, in aiding or encouraging the rebellion. That the lawful owner *has been* voluntarily absent, and *has been* in rebellion, does not make it abandoned property. The lawful owner must, at the time the property is taken, be absent, and must at that time be actively engaged in the rebellion. Congress seems to have authorized the taking of the property of those persons who had abandoned their property and gone into the rebellion with the hope of being restored by the power of the rebellion. The property of such persons as should remain at their homes, or, having once fled and given aid to the rebellion, shall have returned, (for it may be that they have abandoned the rebellion,) cannot be taken as abandoned.

As I understand the facts of this case, the property of

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Case of Mrs. Johns.

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Mrs. Johns never has been, and is not now, in the possession of the Government as abandoned property; it never has been in possession of the Treasury Department. It was taken by the military for its own uses, and has been and is yet held by the military for its uses. Not having been heretofore seized and held as abandoned property, it cannot now be seized and held as such, because Mrs. Johns is not now voluntarily absent, and is not now engaged, either in arms or otherwise, in aiding or encouraging the rebellion. Neither the letter nor the spirit of the act justifies seizures of property as abandoned, except when the lawful owner is engaged in actual hostility to the Government, and is away from his property for that purpose.

By the 4th section of the act entitled "An act to establish a Bureau for the relief of Freedmen and Refugees," approved March 3, 1865, it is enacted, "that the commissioner, under the direction of the President, shall have authority to set apart for the use of loyal refugees and freedmen, such tracts of land within the insurrectionary States as shall have been abandoned."

When this act is read in connection with the act of July 2, 1864, (a part of which has been before quoted, and being in *pari materia*, they should be read together,) in my opinion, the President is not endowed with the power to take possession of property as abandoned which is now in possession of the lawful owner, or where the lawful owner is not now in arms, or otherwise aiding or encouraging the rebellion. The words "shall have been abandoned," as used in the act of the 3d of March, 1865, refer to such property as is described in the act of July 2, 1864. The act of March 3 does not change the description or definition of abandoned property as given in the act of July 2, 1864. It declares the uses to which abandoned property shall be applied.

II. From the facts stated, Mrs. Johns does need the pardon of the Government. Without such pardon, her property is liable to be seized, libelled, and confiscated, and sold by judicial process.

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 Enrolment of Steamboats.
 

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III. If pardoned unconditionally, she would be restored to all her rights of property; and, if pardoned upon lawful condition, then the conditions will show what rights of property are withheld.

It is also stated that a Mr. Chery, a resident of Portsmouth, went off with the rebels from there; but deserted them in the fall of 1862, and returned to Portsmouth. He is worth over twenty thousand dollars. It is asked whether he should be pardoned before his title to property is good?

Until he is pardoned his property is liable to be confiscated.

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

Hon. EDWIN M. STANTON,

*Secretary of War*

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#### ENROLMENT OF STEAMBOATS EMPLOYED IN REBEL SERVICE.

Steamboats owned by citizens of the United States may be enrolled and licensed, although they may have been employed in the rebel service under papers issued by the rebel authorities.

#### ATTORNEY GENERAL'S OFFICE.

*October 2, 1865.*

SIR: I have the honor to acknowledge the receipt of your letter of the 29th September, inclosing a letter from the collector of customs at New Orleans. The collector says that applications are made to have steamboats enrolled and licensed that have been under rebel authority, or been actively engaged in the service of the rebellion; in some instances the boats have had papers from rebel authority; in other instances the owners depend upon the custom-house records to show ownership, which cannot be done, as the records have been destroyed.

He further says, that a number of those vessels have

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Devlin's Account.

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been seized and libelled under the act of August 6, 1861, and released by the court upon bonds.

You desire my opinion as to the propriety of entertaining such applications, and permitting clearances to such vessels.

I do not perceive why such vessels should not be enrolled and cleared, if the owners thereof are citizens of the United States and comply with all the requirements of the law. The question, whether they are confiscable or not, is not affected in any way by the fact of enrolment or clearance; and, in cases where vessels have been bonded, the bond stands in place of the vessel. The object of bonding was to have the use of the vessel.

When the records, showing that a vessel had been previously enrolled, have been destroyed, proof of that fact, satisfactory to the custom-house officer, should be made before another enrolment is permitted.

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

Hon. HUGH McCULLOCH,

*Secretary of the Treasury.*

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DEVLIN'S ACCOUNT.

Claim of the counsel employed by the United States in the matter of the extradition of the "St. Alban's raiders," for professional services, considered.

ATTORNEY GENERAL'S OFFICE,

October 2, 1865.

SIR: I have the honor to acknowledge the receipt of your letter of the 20th of September, transmitting therewith the bills of B. Devlin, Esq., of Montreal, Canada East, and H. H. Emmons, Esq., of Detroit, Michigan, for my consideration and opinion.

The bill of Mr. Devlin is "for professional attendance

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Devlin's Account.

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and services rendered to the United States, in support of their demand for the extradition of the criminals known as the 'St. Alban's raiders,' said attendance and services rendered in the city of Montreal, \$15,000 in gold."

The bill of Mr. Devlin is sent to me without voucher or evidence. I know officially that certain persons known as the "St. Alban's raiders" were arrested in Canada, and taken before the judicial authorities of that province at Montreal, and the United States, through your Department, had several counsel employed in Canada and from the United States to prosecute them. From your letter and from having seen a printed brief in the case by Mr. Devlin, I know that he was one of the counsel employed. I believe from historic information that the prosecution was pending at intervals for several months, and that it assumed various shapes, and caused a good deal of excitement in Canada. At the time of the arrest and trial of the raiders, the people of East Canada were manifesting a wild and extravagant sympathy for the insurgents, and, possibly, it required some courage to meet and breast the then popular fury in Canada. The cause, too, was of great interest in itself, being one of international law, and important to our country at that particular juncture in our national struggle. I take it for granted, that Mr. Devlin acquitted himself to your satisfaction in the prosecution. I have no possible means of knowing, as there is no evidence before me upon the subject, by what rule professional gentlemen in Canada charge their clients.

Being thus left without anything to base an opinion, other than my own notion as to whether the charge is too great, I ought probably to do no more than say to you I do not think you would be warranted in paying it without some proof of its correctness.

I cannot refrain, however, from saying that the charge appears to me to be excessive; and, unless the average fees for professional services in Canada are very much greater than in the United States, it will, I am sure, so strike the professional mind in the United States.



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Devlin's Account.

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This fee of Mr. Devlin stands in singular contrast with that of Mr. Emmons, of Detroit, Michigan. Mr. Emmons aided in the prosecution, and seems, besides, from his bill rendered, to have been active in the preparation of the cases. He left his home, and was for months gone to Montreal and other places in the discharge of his duty. Mr. Devlin was at his home, and could not, in the regular discharge of his professional duties, refuse a proper retainer in the cases. Mr. Emmons charges \$1,500 "for his professional services in examination, preparation, and management of the said case, and auditing and examining accounts," &c. He charges another fee of \$3,000, but that is for professional services in the rendition cases and the prosecution of the conspirators in Canada. From the account of Mr. Devlin as rendered, I do not understand that he had a retainer in the rendition and conspiracy cases. Unless the lawyers of Canada charge customarily very much higher fees than in the United States, Mr. Emmons's charge is preposterously low, or Mr. Devlin's enormously high.

The Government is willing and ever ready to pay a just and full compensation for services rendered, but I could not advise the payment of Mr. Devlin's charge without a full investigation.

As to the claim of Mr. Emmons, it is chiefly made up of moneys expended for the use, and at the request of, the United States. Upon that part of the account you cannot desire that I should say anything. If any error or inaccuracies exist in that, doubtless, they can and will be promptly corrected.

Being furnished with no process of any kind, other than the account as rendered, and knowing nothing of the services, except in a very general way, it may possibly be wrong for me even to express an opinion at all; but thinking it likely that you desire nothing more from me than an opinion founded upon my own professional experience, I would take occasion to say that neither of the two charges, the one of \$1,500 for the St. Alban's raiders, and

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Steinberger's Claim.

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the other of \$8,000 for the rendition and conspiracy cases, seems to me out of the way.

I am, sir, very respectfully,  
Your obedient servant,

JAMES SPEED.

Hon. WM. H. SEWARD,  
*Secretary of State.*

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STEINBERGER'S CLAIM.

Property which was sold to the rebel authorities and captured by the United States cannot be restored to the former owner on payment to the Secretary of the Treasury of the consideration received from the rebel government.

ATTORNEY GENERAL'S OFFICE,  
October 3, 1865.

SIR: I have the honor to acknowledge the receipt of your letter of the 30th September, 1865, in which you send me a statement of facts made by Miss Ellen Steinberger, relative to the two hundred and sixty-three bales of cotton, in regard to which I gave an opinion on the       day of September, 1865. You also call my attention to an endorsement upon the affidavit of Mr. Beirne, which I had not observed. The endorsement is by Mr. Johnson, Treasury agent in Mississippi.

From the statement of the Treasury agent, it appears that the two hundred and sixty-three bales of cotton are entered upon the books of the late insurgents as their property.

Miss Steinberger says, that about the 1st of July, Mr. Johnson, the Treasury agent, demanded the two hundred and sixty-three bales of cotton, and she refused to let it go. It was taken by military force. She presumes that the cotton is in Mr. Johnson's possession as Treasury agent.

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Steinberger's Claim.

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From these facts, in addition to the affidavit of Mr. Beirne, it seems to me that this cotton was as certainly captured from the insurgents as were their guns and other warlike implements. With the consent of its lawful owner, it had been thrown into the common stock of the insurgents, and constituted in part the basis upon which means were raised with which to sustain the rebellion. Rather than destroy it himself, or have it destroyed by others, he gave to the insurgents absolute dominion over it, thereby strengthening their hands in their treasonable efforts. If this cotton does not belong to the Government by capture, it has no owner, the former owner having sold it, and received payment. Now, that what was taken in payment turns out to be worthless, and offer is made to return the consideration and take back the cotton. This offer is made upon the idea that the United States takes, as the successors of the late so-called confederate government. Even if the United States did take as such successors, the offer comes too late. But the United States are not the successors of the late rebel government, and take nothing as such. As captors, they take all the property, of every kind, that the insurgents had accumulated and used as a common fund. To seize, take, or destroy such property, was a part of the duty of the army under the laws of war. This cotton cannot be regarded as private property.

Conceiving such to be the law, I do not think that there is power in the Executive Department of the Government to give it back.

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

Hon. WM. E. CHANDLER,

*Acting Secretary of the Treasury.*

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Bounty to Colored Troops.

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## BOUNTY TO COLORED TROOPS.

The classes of colored persons enfranchised after April 19, 1861, by operation of acts of Congress and the emancipation proclamation, and enlisted into the military service, who are entitled to bounty, indicated.

ATTORNEY GENERAL'S OFFICE,  
October 17, 1865.

SIR: I have considered the questions propounded by the Second Comptroller of the Treasury, in his letter of the 20th ultimo, which you have referred to me, relative to the amount of bounty payable by law to colored troops received into the national military service.

These questions are four in number. They relate to the legal rights, in regard to bounty, of persons of color enlisted and mustered into the military service of the United States, who though slaves on the 19th of April, 1861, afterwards may have become freemen by operation of the statutes of Congress or the President's proclamation of emancipation.

The rights of persons of color, *free on the 19th of April, 1861*, who were enlisted into our military service as soldiers prior to the passage of the act of June 15, 1864, in regard to bounty, were fully discussed and determined by my learned predecessor, Mr. Bates. The question was presented to him in consequence of the provision of the 4th section of the statute of 1864, which required the Secretary of War to make payment to colored soldiers who were *free men on the 19th day of April, 1861*, of any amounts of pay and other emoluments to which the Attorney General might be of opinion they were entitled, under the laws existing at the dates of their enlistment, in addition to the amounts they had already received. The question referred to the Attorney General by the President was specifically the one on which depended the due execution of the act of 1864. He was not requested, because the requirements of the statute did not render it necessary that he should be, to give any opinion touching the legal rights in regard to

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Bounty to Colored Troops.

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pay and bounty of colored soldiers mustered into the service prior to the act of 1864, who were *not free* on the 19th of April, 1861.

The learned Attorney General had no difficulty in determining the point submitted to him. He gave his opinion unhesitatingly, that persons of color who were free on the day that has been mentioned, and who were mustered into the military service before the passage of the statute of 1864, were entitled, by the laws in force at the times of their enlistment, to receive the same pay and other emoluments, as, under those laws, were received by other soldiers of the same branch and of like arms of the service. In the reasoning and in the conclusion contained in the opinion of Mr. Bates, I fully concur.

But that opinion does not embrace, as has been seen, the cases of many classes of colored persons who have become soldiers of the United States.

By far the larger number of our colored troops, I believe, is composed of men who were in the condition of slaves on the day of the massacre of Union volunteers in Baltimore, (the 19th of April, 1861,) and the legal rights of certain classes of these soldiers in regard to bounty, I am requested by you to consider and define. It is with pride and satisfaction that I recall the legislation which gave freedom to many of these colored soldiers of the Republic. The title of some of them to liberty is derived under the provisions of the 9th and 10th sections of the act of June 17, 1862, commonly styled the "Confiscation act." (12 Stats., 591.) By the 9th section of that statute, every slave of a disloyal man escaping from his master and taking refuge within the lines of our army; every slave deserted by such owner and coming under the control of this Government; and, finally, every slave of a treasonable master being within any place occupied by rebel forces, and afterwards occupied by Union troops, was declared "*forever free*" of his servitude. And the word of the nation was pledged that he should not be again held as a slave. By the 10th section of that statute, no fugitive escaping from slavery

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Bounty to Colored Troops.

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into any State or Territory, or into the District of Columbia, was liable "*to be delivered up, or in any way impaired or hindered of his liberty, except for crime,*" unless claimed by a person who has not "*borne arms against the United States in the present rebellion, nor in any way given aid and comfort thereto.*" Before such a claim had been asserted and established in the case of a fugitive from slavery within any State or Territory, or within the District of Columbia, I should hold the party entirely competent to make a valid contract of enlistment under the *status* of a free man. The guarantee of the statute was, that such person should not be "in any way impaired or hindered of his liberty."

It seems to me that, upon principle and independently of the provisions of the confiscation act, slaves fleeing from the rebellion became free.

Slavery is but a relation of society by which one man owes service to another, either for a specified time, or for life. That relation of man to man did not absolve either from his obligations and duties to the Government. The obligations of the slave to the Government are direct and binding, and the master cannot shield or protect him against responsibility to the law. The slave cannot commit rape, arson, or murder, and justify the act as having been done at the bidding of his master; much less can he be guilty of the more heinous crime of treason, the parent of all the sins, suffering, and wrongs of this bloody war, and justify the deed because commanded to do so by his owner. No society or government can exist and permit one man to intervene between it and its power over other men. The Government must look to and rely upon the loyalty, fidelity, and good conduct of each and all the persons of which it is composed. Whether young or old, male or female, bond or free, black or white, each, in his place or station, enjoys the protection of the Government, and for that protection each owes allegiance to the Government, and that allegiance places each and all under the obligation, upon the breaking out of a rebellion or insurrection, which aims at the destruction of the Government,

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Bounty to Colored Troops.

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to escape from the dominion of the insurgents and seek the protection of, and render all the aid in their power to, the true Government. The master's right to and dominion over his slave must, of necessity, be subordinate to this duty. The performance of this higher duty of allegiance by the slave is inconsistent with the relation of master and slave. A man cannot serve two masters. The law is the great master of all. To it, if the master becomes a traitor, and the slave remains, according to duty, loyal, the relation of master and slave is severed. This must be so, or that principle of law which demands loyalty from all, whether bond or free, and which forbids the slave from shielding himself from punishment for crime, because of the orders of his master, is false. The allegiance of the man who is a slave makes it his duty to become the enemy of the man who was his master when the master becomes a traitor. The loyal slave man must withdraw himself from the power and control of the enemies of the Government, and resist, and if need be, fight his traitor master. That power of the master once broken must remain severed forever. Once free, always free, is a principle too well established to be questioned. Nor is this duty of the slave to abandon his master for the sake of his government like unto the right to protect himself against a murderous assault of his master. The right to protect himself against individual attack endangering his life is personal; the duty of upholding and sustaining the government is an obligation to society, and one which society may demand and coerce him to perform. If the law compels him to be and act as the mortal enemy of his master, surely the law will not, cannot be so unreasonable and unjust as to return him to the dominion and place him in the power of that master again. It would be worse than confiding the lamb to the wolf. Sound policy and a speedy pacification of the country accord with these principles. Men who have fought each other bravely can never be at peace, except the settlement be upon terms at least proximately equal and just. Perfect justice and absolute equality cannot be

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expected in this world, but palpable injustice and inequality can be avoided.

In every aspect of the question, then, the slaves of disloyal men were bound by their higher allegiance to the Government, to abandon their masters and become their enemies; such antagonism and hostility severed the relation of master and slave, and the slave became a free man.

Again, all persons held as slaves within the States and parts of States designated in the President's proclamation of emancipation, were by that immortal edict declared free. On the day of the date of the proclamation those persons became, and henceforward have continued to be, free men.

All persons of color once held as slaves, and made free by the statutory provisions to which I have referred, or by the President's proclamation of January 1, 1863, were equally qualified to become volunteer soldiers, and competent to enter into valid contracts of enlistment in the national military service. On the instant they were under the conditions upon which the statutes or the proclamation acted, their status was changed. They ceased to be slaves. They became, to all intents and purposes whatever, free men. The statutes in force at the time of their enlistment, and which prescribed the qualifications of volunteers, contained no prohibition against the enlistment of men who might have once been in the condition of slaves. Congress had wisely not undertaken to measure a man's worthiness to serve the country in the field by the date of his becoming free. Those who were released by operation of law from slavery on the day of their enlistment, were, at all times during the rebellion, as well qualified to become soldiers as men who were free at the beginning of the rebellion. Nor were the men to whom I have referred disqualified from serving in the army on account of color, by reason of any statutory provision operative when their enlistment occurred. Mr. Bates, in the opinion to which I have referred, reviewed the history of the legislation of



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Congress touching the enlistment of soldiers in the regular and volunteer forces of the United States. He was not able to find any statute, passed before or during the late war, which prohibited the enlistment of free colored men into the regular or into the volunteer branch of the national military service.

Being thus qualified and competent to enter that service as soldiers, as I am of opinion persons of color, made free by statute and proclamation, were, the next question would be, whether, apart from certain provisions, to which I will presently refer, in the act of June 15, 1864, any special provision of law existed when they entered the army, regulating the amount of pay and bounty to which soldiers of that class should receive as compensation for their enlistment and service. I have been able to discover no law prior to the act of June 15, 1864, which made any discrimination between soldiers of different color in regard to pay and other allowances; which entitled the white soldier to greater compensation than his colored compeer. By all legislation concerning the pay of United States troops, in force before the passage of the statute of 1864, all volunteers competent and qualified to be members of the national forces, and of like arms of the service, are entitled respectively to receive the same amounts of pay, bounty, and other emoluments or allowance, from the United States.

In the cases of all enlistments of colored persons, prior to the 15th of June, 1864, whether those persons were free on or after the 19th of April, 1861, whether made free by operation of any statute or by effect of the President's proclamation of emancipation, I am of opinion that the recruits are entitled, by the laws existing at the time of their enlistment, to receive the same amounts of bounty as are payable under those laws to other volunteer soldiers.

The next and last question for consideration is, as to the effect of the provisions of the 2d and 4th sections of that statute. It might be urged that, inasmuch as by that section a particular class only of colored troops, namely, those

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who were free men on the 19th of April, 1861, are declared entitled to receive the pay, bounty, and clothing allowed to them "by the laws at the time of their enlistment," other classes of those troops, composed of persons who were not free on that day, are, by implication, not entitled to receive the pay and other emoluments provided for such persons by the laws in force at the dates of their enlistments. I am of opinion, however, that Congress did not intend to divest the rights of any of these persons in respect to bounty, which accrued at the time of their enlistment, under the laws then in operation. I cannot give the statute such an effect, without holding that Congress intended to violate both the legal and the moral obligation of the contracts into which the Government entered with these colored troops when it received them into its service. Without very plain words expressive of such an intention, I could not hold that it was in the mind of the legislature when it enacted the statute of 1864. The effect of the 4th section of the act of 1864 is not to be extended by construction.

With respect to the provision contained in the first clause of the 2d section of the act of 1864, I have to remark that it affects simply, by its terms, the rights of colored soldiers who may have enlisted before the passage of the law, in respect to all emoluments, except bounty, from and after the 1st day of January, 1864. The letter of that provision does not affect the rights of such persons in respect to bounty. These were absolute rights, vested under the laws in force at the time of their enlistment, which, as has been seen, gave the same bounty to colored soldiers rightfully received into the service as was accorded to white troops. They were rights which, whether it was competent for Congress to divest them or not, I cannot hold under the law, as it stands on the statute book, Congress intended to divest.

The second clause of this section of the act of 1864 declares, "that every person of color who shall hereafter be

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mustered into the service shall receive such sums in bounty as the President shall order in the different States and parts of the United States, not exceeding one hundred dollars." This is a definition of the rights respecting bounties of all colored soldiers who may have entered the service subsequent to the passage of the statute. It was entirely competent for Congress to provide a rule for the payment of bounty in all future cases of enlistment; and no larger bounty can be allowed to persons of color who were mustered into the service after June 15, 1864, and while the statute of that date was in operation, than is authorized to be paid to them by that act. That amount is such sum as the President may have ordered in the different States and parts of the United States, not exceeding one hundred dollars.

Finally, I may observe, by the act of July 4, 1864, enacted a little more than fifteen days after the passage of the statute of the 15th of June, the provision just mentioned, was repealed; and all volunteers received into the service were placed upon precisely the same footing in respect to bounty, which was graduated according to the terms of their respective enlistments. (13 Stats., 379.)

My opinion, therefore, is:

1st. That persons of color who may have acquired their freedom by the provisions of the act of July 17, 1862, and who were mustered into the military service prior to the 15th June, 1864, are entitled to receive the bounty provided by law for volunteers.

2d. That persons of color who may have escaped from slavery after the passage of the act of July 17, 1862, and who may have been mustered into the military service before the 15th of June, 1864, and who were unclaimed by loyal persons at the time of their enlistments, are entitled to receive the bounty payable by law to volunteers.

3d. That all persons of color emancipated by the President's proclamation of January 1, 1863, who after the date

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of that proclamation, and before the 15th of June, 1864, enlisted and were mustered into the service as volunteers, are entitled to the like bounty.

4th. That all persons of color mustered into the service after the 15th of June, 1864, are entitled to receive respectively such sums in bounty as the President may have ordered in the different States, not exceeding one hundred dollars. And—

5th. That all volunteers received into the service after July 4, 1864, are entitled to receive the same bounty for like terms of enlistment without regard to color.

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

Hon. HUGH McCULLOCH,

*Secretary of the Treasury.*

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SLAVERY IN MEXICO.

The so-called "protective regulations," established by Maximilian, as Emperor of Mexico, for the government of working men brought into the country by immigrants, constitute a law for the enslavement of such working men.

ATTORNEY GENERAL'S OFFICE,

October 21, 1865.

SIR: I have the honor to acknowledge the receipt of your letter of the 2d day of October, together with an extract from dispatch No. 18, of Mr. William H. Corwin, chargé d'affaires of the United States in the city of Mexico, and also translations of decrees recently issued by Maximilian, now exercising the authority of an emperor in Mexico, in relation to immigration into, and colonization in, that country.

You ask me whether, under these decrees, peonage, or any other form of slavery, can be instituted in Mexico.

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The decrees, of which you have sent to me copies, are, in substance, as follows :

It is recited that, considering the scant population of Mexican territory, it is desirable to give the fullest guarantees of property and liberty to immigrants; it is then decreed,

1. That Mexico shall be open to emigration from all nations.

2. Agents of emigration are to be appointed, and their powers and duties prescribed.

Articles 3, 4, 5, 6, 7, 8, and 9 set out and declare what shall be the rights and privileges of emigrants.

The sixth article reads thus : "Immigrants who wish to bring, or cause to come, working men in considerable number, of whatever race they may be, are authorized to do so, but these working men will be the object of special protective regulation."

The second decree is supplementary, and in it are the special protective regulations for working men referred to in the sixth article.

These regulations read as follows :

1. In conformity with the laws of the empire, all men of color are free by the fact alone of having trod on Mexican territory.

2. They shall make with the patron who shall have engaged them a contract by which he shall bind himself to feed, clothe, lodge, and take care of them in their sicknesses, as well as to pay them a salary, the amount of which shall be settled between them.

The patron shall bind himself beside to deposit to the credit of the working man a sum equivalent to one quarter of his salary in the savings bank, which will be further mentioned below. The working man shall at the same time bind himself to his patron to execute the work to which he shall be set, during a term of five years at least, and ten years at most.

3. The patron shall bind himself to provide subsistence for the children of his working men; in case of the death

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of the father, the patron shall have the guardianship of the children, and they shall remain in his service until the age of majority, on the same condition that the father was.

4. Every working man shall have a book, inspected by the local authority, on which shall be given his description, the indication of the place where he works, and a certificate of good life and conduct. In case of change of patron, the consent of the first patron shall be inscribed on the book.

5. In case of the death of the patron, his heirs, or the individuals who shall have acquired his property, are bound towards their working men on the same terms the patron was. And the working man on his part is bound in respect to the new proprietor in the terms of his first contract.

6. In case of desertion, the working man, apprehended, shall be employed without any pay on the public works until he shall be reclaimed by his patron.

7. Every unjust act of the patron towards his working man shall be turned over to the courts.

8. Special commissions of the police shall watch over the execution of the present regulation, and shall, by virtue of their office, prosecute those contravening the same.

9. The government will establish a savings bank, for the ends hereinafter mentioned.

10. The patron shall deposit, every month, in the bank, to the credit of the working man, a sum equal to one-quarter of the salary to which they are entitled by reason of their contract.

11. The working man may besides deposit in the savings bank the sum of which they shall have full credit.

12. The deposits shall have the advantage of five per cent. annual interest.

13. At the close of his engagement, the working man on the presentation of his book shall receive his peculium integrally.

14. If on the expiring of the contract the working man

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be disposed to leave his money in the savings bank, he can withdraw the interest due, or leave it on deposit; and in the latter case, it shall be capitalized with the primitive capital, and shall also bear interest.

15. In case of death intestate, or without heirs, the peculium of the working man shall pass into the possession of the public treasury.

The sixth article of the decree and regulations are inconsistent and contradictory. Whilst the sixth article of the decree speaks of working men of every race, the regulations under it seem to embrace men of color only.

Notwithstanding the broad declaration in the first regulation, that all men of color are free by the fact alone of having trod on Mexican territory, it is manifest that, in the subsequent regulations, a grinding and odious form of slavery is sought to be established.

Slavery is a law by which one man asserts dominion over the conduct of another, either for a specified time or for life. The law of slavery makes the man a mere machine, controlled and governed by another. The slave has but little occasion to exercise and use the noble faculties of his mind. The physical man is alone of value to the master or patron, and he, of course, looks only to the physical wants of the slave.

That these regulations make slaves of working men and their families, is evident—

1st. They are required to sell themselves for not less than five nor more than ten years.

2d. They are required by law, no matter how circumstances may change, or things may occur that were not reasonably within the contemplation of the parties, to specifically fulfil the engagement.

3d. They must execute every work to which they shall be set by their patron during that term.

4th. They cannot feed, clothe, lodge, or take care of themselves, either in health or in sickness.

5th. They cannot provide for the subsistence of their children, nor educate them, unless by the permission of

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the patron; and, in case of death, their children become the slaves of the patron until the age of majority.

6th. The patron or master can sell or dispose of them to whom they please.

7th. They may complain to the police of the harsh treatment of the master; but have no right to petition for, or seek a change of, any law which may be regarded, as oppressive or unjust to them, or to their class or country.

8th. If the police refuse to hear their complaints, or hearing deny interference, they are without redress.

9th. These regulations contemplate that the working men require physical comforts only. Their minds must remain uncultivated, their morals neglected, and their religious training not cared for.

10th. There is no provision by which the working man can purchase himself or his time, or relieve and improve the condition of his children.

11th. What is to become of the working man and his children after he shall have faithfully served his time, is not provided. Is he to be a free citizen, or is he still to be regarded as a working man, and again compelled to sell himself and his family?

I have no hesitation in saying that these regulations constitute a law which deprives working men of rights which we in this country regard, and which, in every well organized community, should be regarded, as inestimable, unassailable, and indestructible, and certainly makes them slaves. The history of this country, and particularly the history of the troubles from which we are just emerging, shows, that no society can be organized permanently and remain at peace within its own borders, and with the outside world, where these great and important rights are denied to any considerable class of men.

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

Hon. WM. H. SEWARD,  
*Secretary of State.*



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The Steamer Diana.

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## THE STEAMER DIANA.

A claim for the value of a vessel seized *jure belli* at New Orleans, upon the capture of the city by the United States naval forces, turned over to the army, and afterwards captured by the rebels, is not within the jurisdiction conferred upon the Third Auditor by the act of March 3, 1849.

ATTORNEY GENERAL'S OFFICE,  
October 23, 1865.

SIR: Your letter of the 6th instant requests my opinion on certain questions which the Third Auditor states have arisen before him in adjudicating certain claims presented under the act of March 3, 1849. (9 Stats., 415.)

The rules for the adjustment of claims provided for by the statute are, according to the provision of the 3d section, to be prescribed by the Secretary of War, under the direction, or with the assent, of the President of the United States. It would have been more regular, because it would have been in strict conformity with the provisions of the statute, if the Third Auditor had sought the counsel and direction of the Secretary of War, and through him, if it were needed, the opinion of this office touching the cases to which reference is made in the communication which you have sent to me.

I mention this view of the proper course of procedure, in cases of claims under the act of 1849, because you may, perhaps, prefer that your attention should not be unnecessarily engaged with a class of claims which Congress would seem to have committed to the control of another Department. Adherence, in cases that may hereafter be presented under this statute to the Auditor, to the directions of the act of Congress, may become important.

I proceed now to give my opinion on the questions that seem to arise in the case of the claim of Marco N. Radovich, of New Orleans, for the value of the steamer "Diana." Assuming the contents of the petition filed in the Auditor's office are true, the facts of that case appear to be briefly these: The steamer "Diana," a coast-freight and

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passenger packet, worth the sum of forty thousand dollars, purchased in 1861 by the claimant, a loyal resident of Louisiana for twenty-seven years, and employed by him in carrying freight and passengers (for hire) between New Orleans and the lower coast, was, on the 27th of April, 1862, seized at a wharf in that city by Rear Admiral Farragut. That officer, it appears, forthwith placed her in the service of Major General Butler, and she continued to be employed in conveying troops from the transports to the city until the army was quartered in New Orleans. The petitioner states that a few days after the occupation of the city, he waited upon Admiral Farragut and requested him to return the steamer, when the Admiral informed him that the vessel had been transferred to Major General Butler, to be employed as a transport, and that that officer would compensate him for her use. A portion of this statement harmonizes with the declaration of Admiral Farragut contained in a certificate given by him in November, 1862, concerning the seizure of the vessel. The Admiral there states that, although when he took the vessel he intended, in the event of the claimant being able to establish his loyalty, to return her after the service in which it was desirable immediately to employ her had been completed, yet, finding after the troops had been thrown into the city that the army still required her service, he transferred her to General Butler, and left "the decision of the case to the Government."

Whatever may be the true interpretation of this declaration, which is somewhat obscurely expressed—whether or not we are to understand by it that the Admiral, when he found, on the city being occupied, that the military authorities continued to require her service, abandoned or changed his original intention of restoring her to her supposed loyal owner—the fact appears to be clear and well attested that he did place her, after the occupation of the city, and after she had fulfilled the temporary use referred to, out of his jurisdiction and beyond his control, by transferring her to the possession of General Butler, by whom,

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in the command of military officers, she was employed, first, as a dispatch boat, and afterwards as an armed transport for the conveyance of troops to points on the coast, in which latter service she was captured, as stated, by the rebels on the 28th of March, 1863.

This seems to be substantially the case presented by the petitioner to the Auditor, on which is based a claim for indemnity under the 3d section of the act of the 3d March, 1849.

I am clearly of opinion that the claim is not one provided for by the statute, and should be rejected by the Auditor. The case is plainly, I think, not within his jurisdiction.

The act provides, in the 3d section, that any person who has sustained damage by the capture or destruction by an enemy of any horse, mule, ox, wagon, cart, boat, sleigh, or harness, while such property was in the military service of the United States, either by impressment or contract, shall be allowed and paid the value thereof at the time he (it) entered the service. Without pausing to consider whether the word "boat," associated as it is in this provision with such words as "horse," "mule," "ox," "wagon," "cart," &c., in view of the familiar principle of construction which often allows the words of a statute to be explained and interpreted by conjoined words or clauses, the doctrine of *noscitur a socio*, can be held to embrace within its signification, as here employed, a steam vessel of several hundreds of tons burden, and of many thousands of dollars in value, employed as a packet for freight and passengers, in river and perhaps ocean navigation, without considering or deciding that question of construction, it is plain that the property, the value of which is here claimed, did not come into the service of the Government either by impressment or contract.

The "Diana" was seized *jure belli*. She was technically, by reason of her ownership, as well as the trade in which she had been engaged during the rebel rule at New Orleans, enemies' property, liable, on the 27th of April, 1862, to

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capture, either at sea or in port, as a prize of war. Her seizure was an exercise of a well-established belligerent right, derived from the relative hostility of her proprietor, as a resident of a place within hostile jurisdiction. Not the law of necessity, but the law of war, justified her seizure and subsequent employment in the public service. When the naval arm of the Government was placed upon her, it was in assertion of a title to the property conferred by the law of nations. A vessel in her predicament, thus liable to capture and condemnation, seized by a naval commissioned captor, and, in the exigency of belligerent operations, in the very country of her ownership, compelled to do military service for the captors' government, can with no more propriety be said to have been impressed into that service than a drafted man, who may be compelled to perform military duty in the ranks, can be said to be impressed into the army. The right of the naval captors to take possession and control the use of this property did not depend upon any extrinsic circumstances existing at the time and place of seizure; but flowed from an independent source of authority, which conferred an original and absolute right upon the Government to vest in itself by capture and condemnation the ownership of the enemy proprietor.

In the case of the ships taken at Genoa, (4 Rob., 398,) it was declared, I may observe, by Lord Stowell, to be the right of a naval commander, on capturing or enforcing the surrender of an enemy's city, to make seizure of all ships in port, independently of any question of ownership, on the presumption that such property belongs to hostile persons, and to leave it to those who may claim any portion of such property, to be restorable as neutral property, to establish its character and rights to exemption from condemnation. We may grant that, when such a claim of neutral ownership has been established, such a commander has the right to release the property without subjecting it to judicial decision. Whether he would, ordinarily, by virtue of the authority derived from, and incident to, his

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office, have power to restore to its former hostile proprietors property thus seized, which may be clearly confiscable as prize of war, is a question of some interest that need not now be considered.

Nor do I deem it important to determine whether the law can take cognizance, under the circumstances of the case, of such an intention as the one formed by Admiral Farragut when he took possession of this vessel; and especially in view of the fact that he placed it beyond his power to execute his contingent purpose of restoration, by transferring the vessel to the jurisdiction and custody of the co-ordinate military commander at New Orleans.

The case, under the act of 1849, turns upon the character of the seizure of the 27th of April, and that does not depend upon, nor is it affected by, the intention of the naval captor in regard to the subsequent disposition of the property, but wholly upon the nature of the authority or right by which the seizure was made. I have already said that it was made by virtue of a legal right, conferred by the law of war upon the Government and its naval officers, to capture all ships and cargoes in the predicament of this vessel. Having lawfully entered into possession of this property, it was entirely competent for the captor to appropriate her to the use to which she was applied. She was as regularly and lawfully employed after the seizure, in the service of the military commander, as any naval vessel of the United States in the squadron. The transaction bears none of the features and is distinguished by none of the characteristics of an impressment.

If the seizure had been accompanied by a positive promise made by the naval captor to return the vessel after the immediate occasion for her use should pass, and it should be held that such a promise would avail the claimant and entitle him to restoration in a court of prize, the case would not be legally denominable as one of impressment of property into the public service. A promise of that character might be held, under some circumstances, to constitute substantiative ground for a decree of restoration

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The Steamer Diana.

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in a prize court; but could not, in any view of its effect, be regarded, I apprehend, as affecting the relations of the parties, or modifying the original nature of the seizure.

The remarks just made indicate that I am of opinion that, at the date of the seizure of this vessel, the hostile quality of the city of New Orleans and its inhabitants had not been removed. The city, on the 27th of April, was not in our military occupation. The fleet of Farragut was in front of the city, but rebel rule was still dominant there. It was not until two days after that the navy were able to hoist our flag permanently over the national public buildings; not till the second day of the next month that the troops were in actual possession of the town; and not till the 6th of May that General Butler issued that proclamation, from the date of which the Supreme Court has decided our military occupation may be considered "substantial, complete, and permanent," and on the publication of which the enemy quality of the city, its people, and property, qualifiedly ceased and determined. The decision in the case of the *Venice*, (2 Wall., 273,) does not suggest any doubt of the validity of the seizure and detention of this vessel.

I am clearly of opinion, on the whole case, that the claim now presented for her value is not within the jurisdiction of the Third Auditor under the statute of 1849, and should accordingly be dismissed.

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

Hon. HUGH McCULLOCH,

*Secretary of the Treasury.*

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Annuities to Miami Indians.

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## ANNUITIES TO MIAMI INDIANS.

No part of the amount appropriated by the act of March 3, 1865, for the benefit of the Miami Indians, can be paid to persons other than those embraced in the corrected list made by the Secretary of the Interior under the act of June 12, 1858.

ATTORNEY GENERAL'S OFFICE,  
*October 26, 1865.*

SIR: In the treaty between the United States and the Miami Indians, (10 Stats., 1099,) it is provided in the Senate amendments "that no person other than those embraced in the corrected list agreed upon by the Miamies of Indiana, in the presence of the Commissioner of Indian Affairs, in June, 1854, comprising three hundred and two names, as Miami Indians of Indiana, shall be the recipients of payments, annuities, commutation moneys, and interest thereby, stipulated to be paid to the Miami Indians of Indiana, unless other persons shall be added to said list by the consent of the said Miami Indians of Indiana, obtained in the council according to the custom of their tribe."

By the 8d section of the act of June 12, 1858, (11 Stats., 882,) it is enacted, "that the Secretary of the Interior be and he is hereby authorized and directed to pay to such persons of Miami blood as have heretofore been excluded from the annuities of the tribe since the removal of the Miamies in 1846, and since the treaty of 1854, and whose names are not included in the supplement to said treaty, their proportion of the tribal annuities, from which they have been excluded; and he is also authorized and directed to enrol such persons upon the pay-list of said tribe, and cause their annuities to be paid to them in future."

In October of that year, pursuant to the authority so given, the Secretary of the Interior directed that the names of sixty-eight persons should be added to the roll of the Miami Indians of Indiana, and on the 12th of November, 1862, the Secretary added other names for participation in their future payments to the Miami Indians of Indiana,

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and the persons whose names were so added in 1858 and 1862 have regularly received their annuities; but the tribe in council never did, according to their custom, consent to the addition of those names, or to their being paid.

In the act of the 3d of March, 1865, (see Session Acts, 1864 and 1865, page 546,) there are appropriated "for interest on \$221,257 86, uninvested, at five per centum, for Miami Indians of Indiana, (per Senate's amendment to 4th article treaty June 5, 1854,) \$11,062 89."

In your letter of the 12th of October, you ask me whether, in view of the treaty and legislation aforesaid, any part of the amount appropriated by the act of March 3, 1865, can be paid to persons other than those embraced in the corrected list aforesaid, and to the increase of families embraced in said list.

In order to answer this question, it must be considered, first, whether the act of 1865 repeals or modifies the act of 1858; whether payment must be made to the persons named in the corrected list mentioned in the treaty representations only, or to them and the persons whose names have been added by the Secretary of the Interior, under the authority given in the act of 1858.

As to the first branch: So far as the Miami Indians are concerned, the act of the 3d March, 1865, is one of appropriation only. Such an act cannot, by construction or implication, be made to repeal or modify previous permanent legislation. The act of 1858 is not a simple act of appropriation, but expressly authorizes and directs the Secretary of the Interior to add other names to the corrected list mentioned in the treaty, and commands that the persons so added shall be upon the pay-list, and that their annuities be paid to them in the future. The act of 1865 does not in terms repeal the act of 1858, nor are the provisions of the two in such positive conflict that both cannot stand. When the act of 1865 was passed, Congress not only had the treaty before it, but the act of 1858 also, and the fact that the authority given under that act had been exercised. The reference in the act of 1865 to "the Sen-



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ate's amendment to the 4th article treaty June 5, 1859" was to show the reason for and object of the appropriation.

An intention to repeal or modify the act of 1858, and reverse the action of the Government thereunder, cannot be inferred from such a reference in such an act.

The act of 1865 does not repeal the act of 1858.

As to the second branch: A treaty is a contract betwixt persons independent, and, for the purposes of the treaty, equal. Under our form of government, treaties are made by the President and Senate. Some treaties require legislation by Congress before they can be executed. This is known to the contracting parties, as money cannot be drawn from the Treasury except under an act of appropriation. All treaties that cannot be performed without the payment of money must be executed after Congress shall act, and then in the mode, and only in the mode, prescribed by Congress. The executive and the judiciary are powerless to execute such treaties in any other way. It is by virtue of the act of Congress, and not of the treaty, that the money is obtained from the Treasury.

A treaty is a contract of the very highest character, and invested by the Constitution with the dignity of an act of Congress, but with a character no higher and a dignity no greater than an act of Congress made in pursuance of the Constitution. A right which is vested under either cannot be divested by an act of Congress, and yet it is in the power of Congress, by refusing the necessary appropriation, to defeat the performance of a treaty. Treaties made by the President and Senate, that require legislation to execute them, are thus brought under the consideration, and are subject to construction, by Congress. When Congress has considered and construed them, the several Departments are bound by such construction. The President and Senate, who made the treaty, join in the act which gives it construction.

Of the construction given to a treaty by Congress, no one has a right to complain, except the power with which the treaty was entered into, and such complaint must be

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made to the political power of the Government, and not to the organ charged by Congress with the execution of an act.

These views are sustained, as I think, by the cases of James Turner *vs.* The American Baptist Missionary Union, (5 McLean, 344,) and Charles G. Taylor, et al., *vs.* Marcus Morton, (2 Curtis, 454.)

I am therefore of the opinion, that payment must be made according to the list or pay-roll, as added to by the Secretary of the Interior, under the act of 12th June, 1858.

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

Hon. JAMES HARLAN,

*Secretary of the Interior.*

INCREASED COMPENSATION OF EMPLOYEES OF PATENT OFFICE.

The increased compensation allowed to the employees of the Patent Office for the fiscal year ending June 30, 1866, is not payable, by virtue of the appropriation made by the 3d section of the act of June 25, 1864, making appropriations for the fiscal year ending June 30, 1865.

ATTORNEY GENERAL'S OFFICE,

October 30, 1865.

SIR: I have considered the question stated for my opinion in your letter of the 24th instant. The question arises under the appropriating clause in the 3d section of the act of June 25, 1864, "making appropriations for the legislative, executive, and judicial expenses of the Government for the year ending June 30, 1865, and for other purposes," (13 Stats. 160,) and it is, whether that clause applies to and provides for the increased compensation allowed and granted to employees in the Patent Office, by the previous provision of the 3d section, during the current or present fiscal year?

The enacting, as distinguished from the appropriating, clause of that section, provides that twenty per centum be added to the compensation of the females, and of the messengers, watchmen, and laborers employed in the several

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Departments, &c., to commence on the 1st of June, 1864, and to terminate at the close of the fiscal year ending 30th of June, 1866.

The designation of the classes of employees whose compensation is thus increased, includes persons belonging to the same classes employed in the Patent Office, and those persons are entitled to be paid out of the proper and appropriate fund in the Treasury salaries at increased rates here provided for, and during the period of time mentioned in the statute.

But the question is, whether the increased compensation allowed to the employees of the Patent Office, for and during the present fiscal year, which began on the first of July, 1865, and will end on the 30th of June, 1866, is lawfully payable by virtue of the appropriation made by the 3d section of this statute?

The answer depends upon the response that may be given to one or other of the two questions—

1st. Whether the appropriating clause of the section does appropriate the sums necessary to pay the additional compensation specified in the act for and during the present fiscal year; and

2d. Whether, if it does, the money thus appropriated is the fund from which, in the first instance, the increased compensation of the Patent Office employees may lawfully be drawn?

If the first question thus stated is answerable in the negative, it will be unnecessary to answer or consider the second question. It is clear, that if, by virtue and effect of this appropriating clause, money may not be drawn from the Treasury to pay the increased compensation of any of the persons whose salaries are increased by the enacting clause for and during the present fiscal year, the appropriating clause does not provide for the increased compensation of the employees of the Patent Office during the same year.

I am of opinion, on the first question just stated, that no money was appropriated by the section under considera-

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tion to pay the increased or additional compensation specified for the present fiscal year. The words of the appropriating clause are as follows: "And the sums necessary to pay the additional compensation herein specified for the *present and next fiscal years* are hereby appropriated." I appreciate the force of the view under which the words that I have underscored would be interpretable as comprehending the fiscal year running at the date of the act, June 25, 1864, and also the two years next succeeding the then present fiscal year, inasmuch as the enacting clause embraced those years, and increased during them the compensation of the persons to whom the section refers. It might be urged, with a great deal of propriety, that the words of the appropriating clause should be construed, if the words permit the construction, as covering the whole period of the time comprehended by the enacting clause of the section, and that the language of the clause does, without being strained or unduly coerced, extend the appropriation beyond the fiscal year ending June 30, 1866. I see the force of this position, and appreciate the weight of the argument in its favor. But I think that there are reasons for the more narrow, and, as it appears to me, the more natural reading of the law, which countervail those that might be suggested in favor of the opposite view, and limit the appropriation to the year next succeeding the fiscal year which was present when the statute was passed. I will suggest, very briefly, a few considerations that impress me very strongly, and incline my mind to the opinion that I have expressed.

The section in question is contained in the legislative, executive, and judicial appropriation bill for the year ending June 30, 1865, and that bill became a law on the 25th of June, 1864. The act was passed to meet expenses to be incurred during the fiscal year ending on June 30, 1865.

Those that would be incurred during the subsequent fiscal year, ending June 30, 1866, were to be provided for, according to ancient and uniform usage, by subsequent legislation at the next session of Congress. The 8d section contained, however, an enactment, which transcended

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**Increased Compensation of Employees of Patent Office.**

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the scope of the general provisions of the statute. It not only increased the compensation contemplated for certain classes of persons during the fiscal year to which the act was adapted, but directed that the increased compensation should begin on the 1st of June, 1864. It was necessary, in order to meet the expenditure thus authorized, to appropriate the money required to pay the increased compensation granted for as much of the then present year as fell between the 1st and 30th of June, 1864, as well as for the next fiscal year, to which the act was adapted, and with reference to which, as I have stated, it was passed.

If Congress had limited the appropriation to the time embraced by the general provisions of the act, the increased salaries for the fraction of the year 1864 would have remained unpaid. If it had confined the appropriation to the additional compensation, payable for the fraction of the year in which the bill became a law, the appropriation for the increased compensation would not have been co-extensive with that provided for the payment of the regular salaries. It is presumable that the intention of Congress was to make those two appropriations embrace the same period of time, and also to provide means for the payment of the additional twenty per centum for the month of June, 1864. I think that the qualifying words, "for the present and the next fiscal years," were introduced as expressive of such an intention. If Congress had intended to make an appropriation embracing the year ending June 30, 1866, it would, it seems to me, have framed the act thus: "And the sums necessary to pay the additional compensation specified are hereby appropriated," omitting altogether the words "for the present and the next fiscal years." These words appear to have been introduced in order to convey the meaning that the appropriation was not intended to be extended beyond the fiscal year next to that which was present at the date of the act. This construction that I suggest, and to which I am disposed to adhere, harmonizes this section with the other portions of the act. It carries the appropriation made in the 13th section as far as the

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The Isthmus of Panama.

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general appropriations of the act are carried, to the end of the fiscal year 1865, and no further. The consideration of the propriety and uniformity between all portions of the same law, and the view that Congress must, in the absence of controlling reasons to the contrary, be presumed to have intended to act under the influence of that consideration, and to have been governed to some extent by it, are sufficient to resolve any doubt that might arise, on the face of the enactment, touching the true meaning and intent of the legislation.

I answer, therefore, the question asked in your letter in the negative.

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

Hon. JAMES HARLAN,

*Secretary of the Interior.*

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## THE ISTHMUS OF PANAMA.

The 85th article of the treaty between the United States and New Granada does not oblige this Government to protect the Isthmus of Panama from invasion by a body of insurgents from the United States of Colombia.

ATTORNEY GENERAL'S OFFICE,

November 7, 1865.

SIR: I have the honor to acknowledge the receipt of your letter of the 31st of October, 1865, together with a despatch from Commander H. K. Davenport, of the Navy, then acting as consul of the United States at Panama, asking my opinion as to the obligation of this Government, under the 35th article of its treaty with New Granada, to comply with the requisition of the President of the United States of Colombia, for a force to protect the Isthmus of Panama from invasion by a body of insurgents of that country.

The most important privilege secured to citizens of the United States, under the 35th article of the treaty, is, the

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The Isthmus of Panama.

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right of transit from sea to sea, across the isthmus, for themselves and merchandise, without being liable to duties, tolls, or charges of any kind, to which native citizens of New Granada are not subjected for thus passing the isthmus; and in order to secure the tranquil and constant enjoyment of these and other advantages mentioned in the treaty, the United States agree to guarantee, positively and efficaciously, to the isthmus, with the view that the free transit from the one to the other sea may not be embarrassed in any future time while this treaty exists; and, in consequence, the United States also guarantees, in the same manner, the rights of sovereignty and property, which New Granada has and possesses over the same territory.

From this treaty, it cannot be supposed that New Granada invited the United States to become a party to the intestine troubles of that Government, nor did the United States become bound to take sides in the domestic broils of New Granada. The United States did guarantee New Granada in the sovereignty and property over the territory. This was as against other and foreign governments. Without language more explicit and direct to that end, it cannot be that New Granada desired, or the United States intended, to give a guarantee to New Granada against the conduct of the citizens of the latter. The acceptance of such a guarantee would amount to a surrender of sovereignty on the part of New Granada; and the United States, by virtue of the treaty, could claim the right to determine which party in New Granada would keep and perform the treaty, and which not, and, if able, could rightfully put and keep in power the party thus selected. The history of the relations which this Government has ever borne towards the other nations of the world forbids the idea that it ever desired or intended to obtain such control over the internal affairs of any other government. The positive and efficacious guarantee of perfect neutrality mentioned in the treaty must be regarded as having reference to foreign powers.

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Fees of District Attorneys in Revenue Cases.

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In the fourth part of the 35th article, it is agreed betwixt the high contracting powers that, "if any one or more of the citizens of either party shall infringe any of the articles of this treaty, such citizens shall be held personally responsible for the same, and the harmony and good correspondence between the two nations shall not be interrupted thereby; each party engaging in no way to protect the offender, or sanction such violation." This stipulation in the treaty is perfectly mutual, giving to the United States no more power over citizens of New Granada than it does to New Granada over citizens of the United States, and, being mutual, is in direct conflict with the previous part of the article, if in that previous part the United States is authorized to intermeddle with the domestic concerns, or to take sides with the one or the other party in the intestine troubles of that nation.

My opinion, therefore, is, that this Government will not be authorized, from anything contained in the 35th article of the treaty, to send a force to protect the Isthmus of Panama from invasion by a body of insurgents of that country.

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

Hon. WM. H. SEWARD,

*Secretary of State.*

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FEES OF DISTRICT ATTORNEYS IN REVENUE SUITS.

A District Attorney cannot be allowed to retain two per cent. of any moneys realized in a suit under the revenue laws without a previous taxation of his account by the court.

ATTORNEY GENERAL'S OFFICE,

November 10, 1865.

SIR: I have received your letter of the 4th instant, enclosing a communication addressed to you by the Commissioner of Internal Revenue, relative to a claim made



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by the United States attorney for the district of Massachusetts, for commissions at the rate of two per centum on certain moneys received by him, under the circumstances to which I will now refer.

Some time ago a proceeding *in rem* was instituted by the district attorney to enforce the forfeiture of a distillery and a quantity of spirits belonging to the Boston firm of William E. French & Co. After the filing of the information, an investigation was had, under the auspices of the Internal Revenue Bureau, of the transactions of these parties, and it disclosed the fact that they were indebted to the United States in the sum of \$33,000 for unpaid taxes, and the further fact, that they were liable to be proceeded against for a large amount of pecuniary penalties which they had incurred in addition to the forfeiture of the particular property embraced in the proceeding instituted by the district attorney. An offer of compromise or settlement was, under these circumstances, made by the parties to the Commissioner of Internal Revenue. They agreed to pay the amount of taxes found to be due by them, and also the sum of \$17,000, in lieu of all fines, penalties, and forfeitures incurred by, and which were recoverable or enforceable against them, at the suit of the United States. This proposal was accepted by the Department, and the district attorney was directed, on the payment of the stipulated sums, amounting to \$50,000, to discontinue the proceeding against the distillery and the liquor. The money was paid into the hands of the district attorney, and the proceeding was dismissed. He now contends that he is entitled, under the provision of the 11th section of the act of March 3, 1863, to be paid two per centum on the amount of money thus received by him, on the ground that the money was, within the meaning of that act, either collected or realized in the proceeding instituted to forfeit the distillery and liquor.

This claim may be well founded in fact and in law, but has the court in which that proceeding was instituted so decided? If it has, you might be warranted in allowing the

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district attorney to deduct from the moneys in his hands the amount which he contends he is entitled to be paid; but if it has not, I do not see that you have any authority to comply with his demand. The act of 1863 provides, in the 11th section, that there shall be taxed and paid to a district attorney two per centum on all moneys collected or realized in any suit or proceeding arising under the revenue laws conducted by him, in which the United States are a party. Two things are thus authorized and required: the one is the taxation of the amount payable in such suit, and the other is the payment of that amount. The taxation must precede the payment. The payment must be made pursuant to the taxation. There can be no legal payment before or until the amount lawfully payable has been duly taxed. The district attorney is not entitled to be paid the amount claimed by him before or without a taxation duly had of the amount presented, any more than the Department may be entitled to withhold from him, after the taxation of his bill, the amount which the court may determine he has a right to demand and receive. The taxation of a bill for costs or compensation in a judicial proceeding is the ascertainment or liquidation by or under the authority of the court of the amount due and payable therefor. The district attorney, claiming, as he does, under the statute, must establish his claim according to the statute. He must show that the court or proper officer has acted upon his bill; and, until he exhibits proof of that fact, you are not authorized, in my opinion, to consent to the payment of any part of the amount demanded. He must present his bill to the district court in which the information was filed, and ask it to say, under the circumstances of the case as they shall appear, whether any part, and how much, if any, of the money he now holds was realized or collected within the meaning of the act of 1863, in the proceeding to which I have referred. If the court shall determine that the entire amount now in his hands, and received in the settlement arranged by the Department, was, in the sense of the statute, realized in that proceeding,

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Fees of District Attorneys in Revenue Cases.

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it will have no difficulty in "taxing" his account at the full amount embraced in it; and, in that event, you might well be justified in making payment conformably to the ruling of the court. But if the court should be of the opinion that no part of the \$50,000 in question, under the facts of the case, was either collected or realized in the proceeding against the distillery, and should this reject the entire claim of the district attorney for commissions, that will make an end of his demand, under the statute of 1863. Such a decision, however, may not bar a future and independent claim by the district attorney for a reasonable compensation for the services he may have performed in connection with the payment of the large amount realized by the settlement referred to. If the court should determine that he is not entitled, under the act of 1863, to any compensation, on the ground that no part of that amount was realized in the proceeding for forfeiture, the district attorney might well be entitled, independently of that act, to be paid such an amount as would afford him a reasonable compensation for the labor, time, and trouble expended in the matter of the settlement. The question of *quantum meruit* would be one for your determination, under all the circumstances of the case. Such a claim as I suggest, however, could only be allowed after the decision by a court against the right of the district attorney to receive any allowance under the statute of 1863. You have no power to give him extra compensation for his services; but you have the right to allow him compensation for extra official services, rendered at the request or with the sanction of your Department. Whatever amount the court may determine he is entitled to receive, under the act of 1863, will be the true legal measure of his compensation, and you will have no authority to increase it; but, if it should decide that no allowance could be made to him out of the fund under that act, you may then remunerate the officer according to your own views of the character, extent, and effectiveness of the services rendered by him in connection with the payment of the money now in his hands.

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Application of American Guano Company.

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I forbear to express my opinion on the validity of the claim made by the district attorney under the statute of 1863; because my opinion, in the view I take of the character of the question, could furnish no legal guide in this or any similar case. Whether he has a right to deduct two per centum on \$50,000, or two per centum on \$5,000, by the terms of the act of 1863, from the money deposited with him, is a question, in my opinion, Congress has left to be determined in the court.

The duty and the responsibility must rest where the law has placed them.

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

Hon. HUGH McCULLOCH,

*Secretary of the Treasury.*

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APPLICATION OF AMERICAN GUANO COMPANY.

The Secretary of State ought not to revoke the Proclamation issued August 7, 1860, relative to Howland's Island, in the Pacific Ocean, in favor of the United States Guano Company, upon the application of the American Guano Company.

ATTORNEY GENERAL'S OFFICE,

*November 13, 1865.*

SIR: On the 7th day of August, 1860, a proclamation was issued under the seal of the State Department, and signed by Wm. Henry Trescott, acting Secretary of State. The proclamation recites that George E. Netcher, a citizen of the United States, had given the required notice of the discovery of guano on Howland's Island, in the Pacific Ocean, the island lying in north latitude fifty minutes, and in longitude west one hundred and seventy-six degrees, fifty-two minutes, and that the island had been occupied by A. G. Benson on behalf of himself and associates, W. W. Taylor and the said George E. Netcher. It is also recited that the United States Guano Company, of New

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Application of American Guano Company.

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York, a corporation being the assignees of the assigns of the parties aforesaid, has executed a bond in accordance with the requirements of the acts of Congress of the 18th August, 1856; wherefore, it is made known that the said company is entitled, in respect to the guano on said island, to all the privileges and advantages by that act to be secured to the citizens of the United States.

With your letter of the 30th October, 1865, you send the petition of Mr. C. L. Marshal, President of the American Guano Company, in which he asks that the above proclamation shall be revoked or cancelled by the State Department, and that a like proclamation shall be made in behalf of the American Guano Company, and modified so as to secure and protect the just rights of the last-named company. The grounds upon which this request is made are fully set out in the petition, and will be considered hereafter.

Before considering the grounds of the application, it is proper to state, that I have read and concur in the opinions of my predecessor, Attorney General Black, one of date the 2d day of June, 1857, the other of date the 12th July, 1859, in which he had occasion to construe the act of the 18th August, 1856. (See 11 Stats. at Large, ch. 164.) The opinion of the 12th July, 1859, was upon conflicting claims to the benefits conferred by the said act of Congress. After a careful review of the facts of that case, the Attorney General comes to the conclusion that the political branch of the Government ought not to interfere betwixt the parties, and that any legal and equitable right that might exist in favor of one claimant against another were proper subjects for the determination of a judicial tribunal.

I will now consider *seriatim* the grounds upon which a revocation is sought and another proclamation requested.

1st. That the proclamation was without the authority of the President of the United States. Each of the Executive Departments is, except where some special duty is directly imposed by Congress, under the immediate control and supervision of the President. What the Department does,

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Application of American Guano Company.

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must be regarded as having been done by the order and sanction of the President. As a general rule, no one can question the authority of the head of a Department but the President. This general rule applies in this case.

2d. "The proclamation is not signed by the President, as contemplated by the act of Congress."

The act does not require the signature of the President to any paper or proclamation; it does not say in what mode the President shall manifest his decision that the island shall appertain to the United States, and that the discoverer of guano thereon shall enjoy the exclusive privileges conferred thereby. He is left free to adopt such mode as he shall deem best, or that was customary. I think that the mode adopted is the usual and customary one, and most likely the very one contemplated by Congress. It is through the State Department that the President corresponds with foreign nations; and, as questions of international rights and obligations would likely arise by reason of the execution of the act, Congress required that notice of the discovery of guano upon an unoccupied island, and proofs of the occupation and possession of the island by the discoverer, should come to the President through that Department. It has been the general practice of the Government, by proclamation, to make known to the world any action of the Government that may affect other governments, or the citizens or subjects of other nations.

I think, therefore, that the act of Congress did not contemplate a signing by the President, but that he would rightfully manifest his decision in the customary way, by proclamation of the State Department.

3d. "That Wm. Henry Trescott had no authority in law to affix the seal of the United States to the said proclamation, or to sign the same officially, unless he had been authorized to do so by the President, and, as your petitioner is informed and believes, no authority was given and filed in the office of the Secretary of State."

The proclamation was not made under the seal of the

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Application of American Guano Company.

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United States, but under the seal of the Department. It is not customary, nor was it necessary, to use the seal of the United States to such a proclamation. I know of no law that requires the special written authority of the President for the use of the seal of the State Department; on the contrary, such authority is presumed. The custody and use of the seal of the Department, and the exercise of the functions of office of the Secretary of State by Trescott, made his acts and doings good, as far as third persons are concerned.

The 4th, 5th, and 6th reasons in favor of granting the prayer of the petitioner are to the effect, that the proclamation was obtained by a fraud upon the Government, and a fraud upon his employers, by Benson.

To sustain the allegation that the proclamation was procured by fraud upon the Government, it is said that one Arthur Benson, at the cost, for the benefit, and as the employee of the persons who afterwards composed the American Guano Company, occupied and took possession of Howland's Island. A. G. Benson was the president of the American Guano Company, and whilst he was president of the company, he gave the notice and furnished the proofs upon which the proclamation issued. It is stated in the petition that the notice and proofs were given and furnished to the Department without the knowledge and sanction of the company, and it does not appear that the American Guano Company did, at any time, authorize and direct A. G. Benson, or any one else, to give the notice and make the proofs required under the act of Congress. I do not understand that Benson is complained of as not having stated facts sufficient to authorize the proclamation; indeed, the American Guano Company are now claiming that the facts are sufficient; but it is insisted that he failed to disclose who were his associates and his employers. Whether Benson did or not truly make known who were his associates and employers makes an issue of fact betwixt him and the American Guano Company, in which the Government has no interest and ought not to be a party,

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Application of American Guano Company.

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nor ought the political branch of the Government to hear and determine it. Whether Benson was or not the agent of the American Guano Company, and, if an agent, was he faithful or faithless, are questions which can only be appropriately and thoroughly inquired into, examined, and decided in a judicial tribunal.

If the American Guano Company trusted Benson, as its agent, to occupy and possess Howland's Island, to give notice to the State Department, make necessary proofs, and procure the proclamation, the company cannot complain to the Department that the wishes of their agent were complied with. As between the company and Benson, the company can complain that Benson transcended his authority, or violated his contract; but, as against the Government and third persons, who had no notice of any agency or contract, the company must adopt the whole of Benson's acts in procuring the proclamation, or none. As the Government had no notion of Benson's agency before the proclamation, the employers of Benson cannot now be permitted to adopt or reject such of his acts as comport with or militate against their interest. That would most likely work injustice to innocent parties.

It is, 7thly, insisted that, if a revocation of the proclamation is not made, and another issued as prayed for, the American Guano Company will be without remedy, and thus make a singular exception to the maxim, that where there is a right there is a remedy.

The refusal of the prayer of the petitioner is no breach of or exception to that maxim. If the facts stated in the petition be true, the company has been wronged, but it can and should obtain redress against the person who committed the wrong. The innocent and legal holders of the privileges conferred by the proclamation should not, by an unjust application of that maxim, be made to answer for the infidelity of the agent or employee of the American Guano Company. Having trusted Benson, the company should bear the losses consequent upon his conduct, and not be permitted to cast them upon persons who



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Convention with United States of Colombia.

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where ignorant of any trust or agency. Having come to the conclusion, upon a careful examination of the grounds upon which you are asked to revoke the proclamation and issue a new one, that you ought not to do so, I will not take up my own time, nor vex you, with a discussion of the question, whether you have the power to do so.

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

Hon. WM. H. SEWARD,

*Secretary of State.*

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CONVENTION WITH UNITED STATES OF COLOMBIA.

The convention of February 10, 1864, with the United States of Colombia, confers on the commission thereby created jurisdiction to determine, and it should determine, whether any, and what, claims had been presented to, but not decided by, the commission under the treaty with New Granada of September 10, 1857.

ATTORNEY GENERAL'S OFFICE,

*November 18, 1865.*

SIR: I have the honor to acknowledge the receipt of your letter of the 14th of November, wherein you say, that there are five cases, which, according to the opinion of the commissioner on the part of the United States, and that of the arbiter, were considered and decided pursuant to the terms of the convention betwixt the United States and New Granada, of the date of the 10th September, 1857, but that the commissioner on the part of New Granada was of the opinion that they had not been decided. In consequence, it has been deemed proper not to pay the claims as to the decision of which such difference of opinion existed. You say that, if in my judgment the Government of the United States will, upon the payment of the claims referred to, have a legal demand upon New Granada, you are willing that they should be paid.

From the papers that accompanied your letter, I am

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Convention with United States of Colombia.

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informed that the commission that was raised by the convention of the 10th September, 1857, did not, within the time limited by the convention for the power and existence of the commission, decide all the cases that were upon their calendar. Another joint convention was, therefore, entered into betwixt the two Governments, on the 10th day of February, 1864. In the last convention, it is recited that, "whereas the joint commission organized under the authority conferred by the first-named convention did fail, by reason of uncontrollable circumstances, to decide all the claims laid before them under its provisions within the time to which their proceedings were limited by the 4th article thereof, the United States of America and the United States of Colombia are desirous that the time originally fixed for the duration of the commission should be so extended as to admit the examination and adjustment of such claims as were presented to, but not settled by, the joint commission aforesaid." The high contracting parties then agree that the time limited in the first convention shall be extended for a period not exceeding nine months from the exchange of ratifications, but the provisions of the first convention are altered in nothing except that the contracting parties shall appoint commissioners anew, and an umpire shall be chosen anew.

Evidently, it was intended by the convention of February, 1864, that the commission created thereby should be a continuation of the commission which had existed under the convention of September, 1857. The books, papers, records, and proceedings of the original commission had to come into the possession and be under the dominion of the new commission.

By the convention of September, 1857, the commissioners could not decide any claim which had not been presented prior to the 1st day of September, 1857, either to the State Department at Washington, or the minister of the United States at Bogota. The new commission have full authority to decide the cases which had been presented within the time specified, and which had not been decided

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Convention with United States of Colombia.

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by the original commission. This is the full extent of its jurisdiction. It has power only to determine such claims as were presented to, and left undetermined by, the former joint commission. The first duty of the new commissioners is, then, to ascertain what claims had not been decided.

To do this, they must of necessity determine what cases had been decided by the old commission. As the contracting parties did not mutually agree what cases had, and what had not, been decided, that duty is devolved upon the new commission, and the contracting powers will be bound by their decision.

It is my opinion, then, that the question which you have asked me is one regularly within the jurisdiction of the present commission to determine. This commission, I understand, is now in session.

I am strengthened in this opinion, because, at the time the last convention was entered into, it appeared from the minutes and records of the old commission that the commissioners differed in opinion as to whether those five cases had been regularly decided or not, and it must be taken that the contracting parties were aware of that fact. It cannot be inferred, from the provisions of either convention, that it was the intention of the contracting powers to give either the United States or New Granada the right to say what had and what had not been decided. That should be determined by the commission, and, when they decide, both powers are concluded.

Considering the first convention, and the proceedings under it, that the minutes of the first commission show the difference of opinion betwixt the commissioners, that the two Governments were advised of that difference when they negotiated the last convention, and the language of the last convention, I am of opinion that the Government did properly withhold payment, pending the negotiations for a new convention, and that, under that new convention, the Government cannot rightfully pay the five suspended claims until the new commissioners shall say whether they were or not decided by their predecessors.

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Claims. for Subsistence Stores.

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Doubtless the claimants are greatly inconvenienced by this delay, but not more so than others whose claims have not been passed upon.

I do not mean to be understood as saying that the present commission can reconsider any case decided by the former, but the commission can determine whether it was decided or not.

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

Hon. WM. H. SEWARD,

*Secretary of State.*

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CLAIMS FOR SUBSISTENCE STORES.

The jurisdiction of the Commissary General, under the 3d section of the act of July 4, 1864, extends only to claims for subsistence which originated in the loyal States.

ATTORNEY GENERAL'S OFFICE,

*November 24, 1865.*

SIR: I have the honor to acknowledge the receipt of your note of the 14th November, 1865, wherein you ask me for a construction of the act of the 4th of July, 1864. There accompanied your note the claims of two ladies of Memphis, Tennessee, who are represented to be loyal citizens, upon the Commissary Department, for hogs and other articles of commissary stores taken from their farms in Mississippi, in the year 1862 and 1863, by the army of the United States under General Grant. These ladies claim that they should be paid by the Department, by virtue of the act of 4th of July, 1864.

The 1st section of that act declares that the jurisdiction of the Court of Claims shall not extend to nor include any claim against the United States growing out of the destruction or appropriation of, or damage to, property by the army or navy, or any part of the army or navy, engaged in the suppression of the rebellion, from the commencement to the end thereof.

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Claims for Subsistence Stores.

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The 3d section enacts, "that all claims of loyal citizens in States not in rebellion, for subsistence furnished to said army, and receipted for by the proper officer receiving the same, or which may have been taken by such officer without giving such receipt, may be submitted to the Commissary General of Subsistence, to cause each claim to be examined," &c.

The question is, whether the authority conferred upon the Commissary General extends only to the determination of claims for forage originating in loyal States, or whether a more general jurisdiction is conferred upon him, and he has power to determine all claims for forage presented to him by loyal citizens of States not in rebellion that may have originated within or without the territory of the enemy in the late civil war.

I am clearly of opinion, that the true construction of the statute will be attained by regarding the words "in States not in rebellion," as qualifying not only the words "loyal citizens," with which they are immediately connected, but also the words "all claims," which precede them.

In order, therefore, that the jurisdiction of the Commissary General in any case may be sustained under this law, it must appear that not only the domicil of the claimant was in a State not in rebellion, but also that the *situs* of the claim, so to speak, was a loyal State.

In the absence of clear and conclusive evidence of an intention to confer a broader jurisdiction than this upon the military officer named in the statute, I cannot hold that Congress meant to invest him with authority of such magnitude, with responsibility so delicate and difficult, and with a duty so distinctly judicial in its character as would be involved in the power to adjudicate the multitudinous claims that might be presented for determination under a different interpretation of the statute.

Authority like that conferred upon the Quartermaster General and Commissary General by this statute is not to be extended beyond the precise limits indicated by the charter which confers it.

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Injunction against the Naval Commander at Mound City.

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In this view of the construction of the act of 1864, the claim of the two persons of Memphis, Tennessee, for articles, within the designation of forage, taken by the army of the Union in Mississippi during the late hostilities, are not embraced by the provisions of that act, and cannot be determined by the Commissary General.

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

The PRESIDENT.

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INJUNCTION AGAINST THE NAVAL COMMANDER AT  
MOUND CITY.

The Attorney General will not give an opinion as to the validity of any exercise of jurisdiction by a court of the United States without a full record of the case; and where a Department doubts the validity of such an exercise of jurisdiction, the Attorney General will advise the head of the Department to raise the question before the court.

ATTORNEY GENERAL'S OFFICE,

*November 27, 1865.*

SIR: I have just received your letter of the 25th instant, stating that the commandant at the naval station at Mound City, Illinois, has been enjoined by the United States district court from selling, under an order of your Department, certain captured property in his possession. You desire me to advise you whether the district court has power to restrain that officer from obeying the order of your Department.

The question of the jurisdiction, in a particular case, of a judicial tribunal, is always a very important one. It becomes especially so when jurisdiction has been exerted in this particular direction. The very inquiry implies doubt of the correctness of the decision of the court in favor of its own authority, and necessitates a review of the grounds on which the authority was affirmed. In such a case, it would be highly improper for me, or any one, to undertake that inquiry, without being in possession of all the

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Exportation of Arms to Mexico.

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facts presented to the attention of the court, and which were supposed to constitute the foundation of its jurisdiction.

I must, in the case you mention, decline to express an opinion on the question of the authority of Judge Treat to award an injunction against the naval officer, until a copy of the record and a full statement of the facts of the case are before me.

I desire, however, to suggest, that the better course would be for the Department to contest, in the first instance, the point of jurisdiction, under representation by competent counsel, before Judge Treat himself, if the case has not gone to final decree.

If the proceeding in which the injunction was awarded was not initiated by the United States district attorney, the services of that officer might be engaged on behalf of the interests confided to your Department; but if the district attorney should have applied for the injunction on behalf of the Government, or any naval officer whom he is entitled to represent, the Department has authority to employ other counsel to advise it, and to protect its interests before the court.

I am, sir, very respectfully,  
Your obedient servant,

JAMES SPEED.

Hon. GIDEON WELLES,  
*Secretary of the Navy.*

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EXPORTATION OF ARMS TO MEXICO.

The Commander of the Military Department of California has no authority to prohibit our own citizens from exporting munitions of war, by way of merchandise, to the belligerents in Mexico.

ATTORNEY GENERAL'S OFFICE,  
December 23, 1865.

SIR: I must ask pardon for my delay, occasioned by pressing engagements in court, in making reply to your

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Exportation of Arms to Mexico.

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letter of the 21st ultimo, enclosing for my consideration two notes, received by your Department, from the minister of the American Republic, with their accompaniments, relative to an order, of the date of October 11, 1865, issued by General McDowell, commanding the military department of California, prohibiting the exportation of arms or munitions of war, by the frontier, into Mexico.

The question asked by you is, whether, in my opinion, this order is in conformity with any laws, regulations, or orders in force bearing upon the subject?

No military officer has the right, in this country, to issue any order to which he cannot lawfully compel obedience by the forces under his command. The test, therefore, of the validity, in point of law, of this order of General McDowell, is whether he could lawfully employ the military forces subject to his control to prevent American citizens and other persons within our jurisdiction from transporting arms or munitions of war, as merchandise, across the frontier into Mexico, in the present state of affairs in that country?

The answer to be given to this question depends upon the character of the acts against which the order is directed; whether they are lawful or unlawful; and, if unlawful, whether the military authority can take cognizance of them, and prevent or restrain their commission. Some offences are cognizable exclusively by civil authority. Others may lawfully be restrained or prevented by military power. Counterfeiting the current coin of the United States is made criminal by statute; but the law leaves the offence to be dealt with by the civil authority of the United States. By the statute of 1818, the setting on foot any military expedition, within the jurisdiction of the United States, against the territory of a foreign State, with whom the United States are at peace, is a high misdemeanor; but the statute expressly authorizes the President to employ the army and navy to prevent the carrying on of any such expedition from our territory. It is plain that, if it should be determined that it is not unlawful for American citizens,



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Exportation of Arms to Mexico.

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neutral people in the war now being waged on Mexican territory, to export articles contraband of war, by way of merchandise, to either of the belligerents, the inquiry as to the jurisdiction of the military authorities over the subject need not be pursued.

In that event, any attempt on the part of those authorities to enforce obedience to rules or regulations of their own in regard to that subject would be clearly a usurpation of power.

Now, I apprehend it to be well settled, that "neutrals may lawfully sell at home to a belligerent purchaser, or carry themselves to the belligerent Powers contraband articles, subject to the right of seizure *in transitu*. The right of the neutral to transport, and of the hostile power to seize, are conflicting rights, and neither party can charge the other with criminal act." (1 Kent's Com., p. 142.) I state the doctrine in the words of Chancellor Kent, "of whose writings it may be safely said," a late English author has remarked, "that they are never wrong." In the case of the Santissima Trinidad, Mr. Justice Story, in delivering the opinion of the court, said: "There is nothing in our laws, or in the law of nations, that forbid our citizens from sending armed vessels, as well as munitions of war, to foreign ports for sale. It is a commercial adventure which no nation is bound to prohibit, and which only exposes the persons engaged in it to the penalty of confiscation." (7 Wheaton, 340.)

Without entering into an extended exposition of the law on this subject, I am of opinion that, if the order of General McDowell was intended to interfere with such trade, conducted by our people, as the authorities to which I have referred have declared to be lawful, the order is not "in conformity with any laws bearing upon the subject."

I observe that a portion of the order to which my attention has been called was probably intended to be directed against military expeditions, or armed enterprises carried on from this country against the belligerents contending in Mexico. Such expeditions and enterprises are, of course,

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Case of Jefferson Davis.

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violations of our statutes, and nothing in the opinion is intended to impugn the validity of the order in respect to them.

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

Hon. WM. H. SEWARD,  
*Secretary of State.*

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CASE OF JEFFERSON DAVIS.

Reply of the Attorney General to the resolution of the Senate relative to the prosecution of Jefferson Davis for treason.

ATTORNEY GENERAL'S OFFICE,  
*January 6, 1866.*

SIR: I have the honor to acknowledge the receipt from you of a copy of the resolution of the Senate of the United States, of date the 21st of December, 1865. In that resolution, the Senate respectfully request to be informed upon what charges, or for what reasons, Jefferson Davis is still held in confinement, and why he has not been put upon his trial.

When the war was at its crisis, Jefferson Davis, the commander-in-chief of the army of the insurgents, and other prominent rebels, were taken prisoners by the military forces of the United States. It was the duty of the military so to take them. They have been heretofore and are yet held as prisoners of war. Though active hostilities have ceased, a state of war still exists over the territory in rebellion. Until peace shall come in fact and in law, they can rightfully be held as prisoners of war.

I have ever thought that trials for high treason cannot be had before a military court. The civil courts have alone jurisdiction of that crime. The question then arises, where and when must the trials be held?

In that clause of the Constitution mentioned in the reso-

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Case of Jefferson Davis.

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lution of the Senate, it is plainly written that they must be held in the State and district "wherein the crime shall have been committed." I know that many persons of learning and ability entertain the opinion, that the commander-in-chief of the rebel armies should be regarded as constructively present with all the insurgents who prosecuted hostilities and made raids upon the northern and southern borders of the loyal States. This doctrine of constructive presence, carried out to its logical consequences, would make all who had been connected with the rebel armies liable to trial in any State and district into which any portion of those armies had made the slightest incursion. Not being persuaded of the correctness of that opinion, but regarding the doctrine mentioned as of doubtful constitutionality, I have thought it not proper to advise you to cause criminal proceedings to be instituted against Jefferson Davis, or any other insurgent, in States or districts in which they were not actually present during the prosecution of hostilities.

Some prominent rebels were personally present at the invasions of Maryland and Pennsylvania, but all, or nearly all, of them received military paroles upon the surrender of the rebel armies. Whilst I think that these paroles are not ultimate protection against prosecution for high treason, I have thought that it would be a violation of the paroles to prosecute those persons for crimes, before the political power of the Government has proclaimed that the rebellion has been suppressed.

It follows from what I have said, that I am of the opinion that Jefferson Davis, and others of the insurgents, ought to be tried in some one of the States or districts in which they in person respectively committed the crime with which they may be charged. Though active hostilities and flagrant war have not for some time existed between the United States and the insurgents, the peaceful relations between the Government and the people in the States and districts in rebellion have not yet been fully restored. None of the justices of the Supreme Court have

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Case of Jefferson Davis.

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held circuit courts in those States and districts since actual hostilities ceased.

When the courts are open, and the laws can be peacefully administered and enforced in those States whose people rebelled against the Government—when thus peace shall have come in fact and in law—the persons now held in military custody as prisoners of war, and who may not have been tried and convicted for offences against the laws of war, should be transferred into the custody of the civil authorities of the proper districts, to be tried for such high crimes and misdemeanors as may be alleged against them.

I think that it is the plain duty of the President to cause criminal prosecutions to be instituted before the proper tribunals, and at the proper times, against some of those who were mainly instrumental in inaugurating, and most conspicuous in conducting, the late hostilities.

I should regard it as a direful calamity, if many whom the sword has spared the law should spare also; but I would deem it a more direful calamity still, if the Executive, in performing his constitutional duty of bringing those persons before the bar of justice to answer for their crimes, should violate the plain meaning of the Constitution, or infringe, in the least particular, the living spirit of that instrument.

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

The PRESIDENT.

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**Report of Pacific Railroad Commissioners.**

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**REPORT OF PACIFIC RAILROAD COMMISSIONERS.**

The 4th and 5th sections of the act of July 1, 1862, and the 6th and 8th sections of the act of July 2, 1864, relative to the Pacific Railroad, require that the report of the commissioners, upon which the bonds are authorized to be issued to the company, shall be the result of the joint examination and judgment of the three commissioners.

ATTORNEY GENERAL'S OFFICE,  
*January 15, 1866.*

SIR: I have the honor to acknowledge the receipt of your note of the 13th January, wherein you inform me, that the report of Frederick F. Low and Josiah Johnson, two of the commissioners appointed by the President, and Samuel S. Montague, chief engineer of the company, (Par-don H. Sibley, the other commissioner, being absent from California, and not joining in the certificate and report,) has been presented for the purpose of obtaining the bonds from the Department.

You ask whether this report will authorize a delivery of the bonds under the 4th and 5th sections of the act of July 1, 1862, and sections 6 and 8 of the act of July 2, 1864.

It is enacted by the 4th section of the act of July 1, 1862, (see 12 Stats., 492,) that whenever said company shall have completed forty consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated by the act, and supplied with all necessary drains, culverts, viaducts, crossings, sidings, bridges, turnouts, watering-places, depots, equipments, furniture, and all other appurtenances of a first-class railroad, the rails and all the other iron used in the construction of said road to be American manufacture of the best quality, the President of the United States shall appoint three commissioners to examine the same, and report to him in relation thereto, and in cases of vacancy occurring in said board of commissioners, by death, resignation, or otherwise, the President is authorized to fill the vacancy.

The 5th section directs that the Secretary of the Treasury

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Report of Pacific Railroad Commissioners.

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shall, upon the certificate in writing of said commissioners, of the completion and equipment of forty consecutive miles of said road and telegraph, in accordance with the provisions of this act, issue to said company bonds of the United States, &c.

As far as the question before me is concerned, I do not think that the provisions above quoted are at all modified by the 6th and 8th sections of the act of July 2, 1864.

It will be perceived from the statement of the case made by you, that it does not certainly appear whether Mr. Sibley did or did not join in the examination made by the board of commissioners. The affirmation that he did not join in the certificate and report, because he was absent from California, is not a declaration that he did not unite in the examination preliminary to the report. I infer, however, that he did not do so, and base my opinion upon the fact that he was not present at the examination.

The duties imposed by this act upon the board of commissioners are highly important and responsible, requiring the exercise of judgment, founded upon such examination of the road and telegraph, and such consultations amongst the members of the board in relation thereto, as the nature of the subject demanded. The thing to be done was not purely ministerial. The act of Congress contemplates that a report cannot be made until the three commissioners shall have examined the road and telegraph, have consulted together, and compared opinions, and that the report is the result of their joint discretion and judgment. As it does not appear that the three commissioners have made the requisite examinations, compared opinions, and that the report is the result of such examinations and consultations, the bonds should not be delivered upon it. It is not such a report as is required by the act of Congress.

I give no opinion upon the question, whether the bonds would be deliverable if the three had examined and reported a majority and a minority report, or in case one of the

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Steamer St. Mary.

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commissioners should wilfully fail to unite in the report, or to make one.

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

Hon. HUGH McCULLOCH,  
*Secretary of the Treasury.*

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STEAMER ST. MARY

This vessel or its proceeds should not be restored to the claimant under executive sanction and authority.

## ATTORNEY GENERAL'S OFFICE.

January 6, 1866.

SIR: I have the honor to return herewith the papers which you referred to me on the 6th instant, relative to the claim of C. F. Venegerholtz, for restoration of the steamer "St. Mary," and to state that I am clearly of opinion, on the facts presented by these documents, that the property should not be restored to the claimant under executive sanction and authority.

Enough appears in the statement of the case furnished to the Secretary of War by the Judge Advocate General to render it probable that the claimant acquired his interest in this vessel by a course of illicit trading with the enemies of the United States, and that, as against the Government, he possessed no valid title to the property.

That question, however, is one eminently fit to be adjudicated by a court of the United States, before which the Government and the claimant may be able to assert their respective titles to the vessel.

The only question that remains for my consideration is in regard to the particular judicial disposition that should be given to the case. Should it be treated as one subject to the jurisdiction of the Court of Claims, under the acts of

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Steamer *St. Mary*.

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March 3, 1863, and July 2, 1864, or should the property or its value be placed under the judicial control of a prize court of the United States, in accordance with the provisions of the statute of June 30, 1864, and libelled for condemnation on behalf of the Government? I have no doubt that, independently of the 7th section of the act of July 3, 1864, the case would be one within the prize jurisdiction of the courts of the United States. Were the provisions of that section not found in the statute-book, I should not hesitate to advise that the War Department either send the vessel into some port for adjudication by a district court, or deposit her appraised value, subject to the order of one of the district courts of the United States, pursuant to the statute of June 30, 1864. But the act of July 2, 1864, is part of the law of the land, and must be considered in determining the present question.

The 7th section of that act is one of very doubtful meaning and difficult interpretation. It provides that "no property seized or taken upon any of the inland waters of the United States by the naval forces shall be regarded as maritime prize; but all property so seized or taken shall be promptly delivered to the proper officers of the courts, or as provided in this act and in the said act approved March 12, 1863."

This vessel was captured on, what I suppose is denominated, "inland" water of the United States. Without pausing to state or consider the many important questions that arise on the face of this enactment, my attention, in this connection, is arrested by the particular inquiry, whether the provision I have cited abolishes the prize jurisdiction of the courts in all cases of captures of water-borne property on the inland waters of the United States, or merely deprives naval captors of all benefit from the seizure of such property? The question under this provision is by no means free of difficulty, whether the act of 1864 strikes at the root of prize jurisdiction in cases of naval capture on our inland waters, or merely affects the



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Steamer St. Mary.

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rights of the naval captors in regard to the distribution of the proceeds of property conferred by other statutes.

As at present advised, however, I am of opinion, in view of the decision, as I interpret it, of the Supreme Court, in the case of "Mrs. Alexander's Cotton," that it was the intention of Congress to destroy the prize jurisdiction of the courts of the United States in all cases of the capture by naval vessels of property on the inland waters of the United States.

If I am correct in this view of the statute, a portion of such jurisdiction must be regarded as no longer existing in cases of the seizure of property on those waters by military as distinguished from naval officers.

The present was not a case of naval capture; the seizure of the vessel was effected solely by officers of the army. It occurred also, as I understand, after the passage of the act of July 2, 1864. The case is therefore governed by the captured and abandoned property acts. They determine the disposition which should be given to the property by the Government. It should be turned over to an agent of the Treasury Department, to be disposed of in accordance with the act of March 12, 1863.

The proceeds of the sale will be deposited in the Treasury of the United States, there to await the claim of the alleged owner, preferred in the Court of Claims.

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

The PRESIDENT.

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Gold Claimed by Richmond Banks.

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## GOLD CLAIMED BY RICHMOND BANKS.

Advice in regard to the proper disposition, by the Treasury Department, of the gold coin claimed by certain Richmond banks, on special deposit with the United States Treasurer.

ATTORNEY GENERAL'S OFFICE,

February 2, 1866.

SIR: I have considered the papers and documents transmitted to me, under cover of your letter of the 2d ultimo, in connection with the application of certain banks of Richmond, Virginia, for the restoration of a quantity of gold coin claimed by them, and now on special deposit with the United States Treasurer.

The disposition proper to be made of this property, under the statutes, depends upon its legal character or quality. If it is in a legal sense "captured property," it should take the course prescribed for such property in the acts of March 12, 1863, and July 2, 1864, and the claimants should be remitted to their statutory remedy for its recovery.

The character or quality of the property is to be determined in the light of the facts which transpired in relation to it before, and at the time, it came into the possession of the Government.

It appears that, in the month of August, 1865, this coin, then lying on deposit at Augusta, Georgia, was turned over to an agent of the Treasury of the United States by Major General Steadman, in obedience to an order of the President.

In considering the legal effect of this order, and the action of General Steadman pursuant to it, it is important to bear in mind that a distinction is to be drawn between a case of seizure and a case of capture. Every case of seizure of property *jure belli* is not a case of capture. I apprehend, in order to constitute a capture, in the technical legal sense, two things are essential and must concur: actual seizure of the property, or reduction of it under the dominion of the taker, and an intention to appropriate it as

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Gold Claimed by Richmond Banks.

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prize or captured. There must, in other words, be an act accompanied by a certain intention in the mind of the person doing the act.

Assuming that no seizure or capture of the property had occurred prior to the taking by General Steadman, under and in pursuance of the President's order, the effect of the seizure by that officer would depend upon, and is determinable by, the intention of the President at the time he directed the coin to be turned over to the Treasury agent.

If the President, in dispossessing the hostile proprietors, and reducing the property into the possession of the Government, intended to take and retain it, on behalf of the United States, as captured property, I do not see how the conclusion can be escaped that, when General Steadman took the coin in obedience to the order, it became *eo instanti*, by operation of his act of seizure, and the intent of the President who directed it, "captured property," in contemplation of the law.

But suppose the property was in fact under military seizure by General Steadman before, and at the time the President issued his order of August 23, 1865, but that that officer had taken and held it without any intention to appropriate it for the Government: I apprehend that the President was competent, independently of the will or wish of General Steadman, to convert his seizure into a capture. If the President so intended, at the time he issued his order, it was captured when General Steadman received the order, and acted in obedience to its command.

So that, whether the seizure dates from the turning over to the Treasury agent, or from some previous act done by General Steadman in respect to the property, the question raised touching the legal quality of the property may depend entirely upon the purpose and intention of the President when he issued the order to which I have referred. I say, *may* depend, because I am excluding now from my consideration all the facts in the case that bear upon the antecedent condition of the coin; antecedent, I mean, to the order of the President to General Steadman.

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Gold Claimed by Richmond Banks.

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Assuming, then, that that officer never did capture the property, except in so far as the order to him had the effect of making his seizure, when he turned it over to the Treasury agent, a capture: the question arises, whether the order of the President is to be interpreted as, and is to have the effect of, an order for the capture of the property?

The legal presumption, especially in view of the circumstances under which the order was issued, is, that it was intended to have that effect. On the face of the order, it may be remarked, that the coin is described as "captured." The employment of that designation, as descriptive of the property, would seem to imply, that the President regarded it as already in the position of property which had been previously definitively seized, with intention to appropriate, by the military authorities. But it is not important to determine the precise effect, in interpreting the order, to be given to the use of the term "capture;" because it seems to me clear that, *prima facie* at least, in view of what is known to have transpired in relation to the coin before the President issued his order, that order must be regarded legally as the expression of an intention, on the part of the President, to effect, through General Steadman, a capture of the coin.

It appears, from the documents submitted to me, that early in August, 1865, the officers of the banks applied to the President, or the Secretary of War, for a release of a seizure of this coin, which had been made at Washington, Georgia, before its removal to Augusta, on behalf of the Freedmen's Bureau, on the ground, as I understand, that it was abandoned property.

General Steadman, on receiving directions from the Secretary of War to report all the ascertainable facts in respect to this coin, made a report to the Secretary, dated August 12, 1865, in which he stated, that in the latter part of July, 1865, General Wild, sub-commissioner of the Freedmen's Bureau, had claimed the coin, then on deposit at Washington, Georgia; that the agent of the banks reported the case to him, General Steadman; that he thereupon gave the agent

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Gold Claimed by Richmond Banks.

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"safe-conduct" for the coin from Washington to Augusta, Georgia; and that the coin was, at the time of making his report, in the possession of the agent, who was not at liberty, however, to move the coin away from Augusta without further orders. There are other facts relative to the history of this coin mentioned in this report, but they are not important in the present connection.

General Steadman, it is to be observed, does not state specifically that the coin was, on August 12, under seizure by him; nor does he say that it was then under the protection of any "safe-conduct;" although he does say that it was under such "safe-conduct" while *in transitu* between Washington and Augusta.

The fact, however, of possession by the banks, if any they had, does not conclusively show that the property was not, in legal contemplation, under seizure by General Steadman. It is well settled that it is not essential, to constitute a capture, that the enemy should take actual possession. The property was undoubtedly under the dominion of the military authorities at Augusta; there was no ability to resist, and no prospect of escape. (3 Rob., 306.) This point may, perhaps, become important in another part of the case.

This report having been made by General Steadman, on August 20th, the Secretary of War telegraphed to him that the President had the claim of the Richmond banks "to the coin on deposit" in Augusta under consideration, and that he was directed not to restore it to the banks, but to keep it securely in his charge to abide the President's order.

The message proceeded: "You will be promptly notified of the President's decision, when it is made, and in the meantime, keep the coin in secure custody." The effect of this order was to institute a seizure of the coin, whether General Steadman had previously seized it or not.

On the 23d of August, the President caused General Steadman to be informed, by the order of that date, and already referred to, that the claim of the banks for restora-

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Gold Claimed by Richmond Banks.

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tion of the property, described as "the coin captured, and on deposit in your Department," had been rejected, and that he was directed to turn it over to an agent of the Treasury of the United States, to be designated by the Secretary of the Treasury, to receive and transport it to Washington city. The legal presumption arising from this state of facts, in regard to the property, is, that when it passed into the custody of the Treasury agent, under the order of August 23d, the property was, legally speaking, in the condition of captured property. I think it is fairly inferable, from the circumstances under which this order was issued by the President, that he intended that General Steadman should reduce it into the possession of the Government, in order that it might be dealt with as property captured in war; that that officer, in other words, should effect a legal capture of this coin.

But I am of opinion that neither the President nor the Department is absolutely bound by the presumption, in regard to the character or quality of the property at the time the agent received it, arising out of the *res gestæ* of the transaction, as disclosed in the documents before me. The President is competent to interpret his own actions, and to give to them the effect which he intended they should have, if in any way a different effect has followed from them.

If the President did not intend to impress any new character upon the property, different from that which it bore previously to the order to General Steadman, but designed, in giving his order, simply to indicate his will in regard to the disposition of the property, I am of opinion that the President has the power to interpose, and direct the property to be restored to its owner, provided it should clearly appear that it was not already in the predicament of captured property, and thus under the control of the statutes at the time he undertook to direct General Steadman's action in respect to it. If by reason or effect of what has transpired in relation to it, before the attention of the President was directed to the matter, this coin had been placed, in fact and in law, in the condition, and impressed

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Gold Claimed by Richmond Banks.

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with the quality, of captured property, then I am opinion that neither the President nor the Treasury Department can lawfully interfere to prevent the coin taking the course prescribed for such property in the statutes.

What, then, was the character already impressed upon, and affixed to, this coin at the time the order of August 23d was issued?

Was it "captured property," in the hands of General Steadman, or any other military officer?

These questions cannot well be answered in the state of the evidence before me on the subject. It appears to me, however, that the coin was not captured previously to its coming under the notice and control of General Steadman, and that, even if the fact should be otherwise, the lien, so to speak, of any antecedent capture that may have occurred, was removed by the action of General Steadman, in securing the removal of the coin to, and its deposit at, Augusta.

I think that it will be ascertained, on the further investigation presently to be recommended, that the question suggested as important to be determined, may be solved by the legal effect of those facts, including the acts of General Steadman in respect to the property, which occurred after it left Washington under the protection of the safe-conduct.

I observe among the papers of the case an informal statement of recent date, (January 9, 1866,) made by that officer, over his own signature, but not addressed to any Department of the Government, and given at the request of the attorney of the claimants, to the effect that the coin was not captured by the forces under his command, and that, independently of the orders which he received to take possession of it, the property would not have been interfered with by him. While I do not wish to be understood as intimating a doubt touching the character of this statement of General Steadman, I think that the Government, before determining the disposition to be made of this large amount of money, should fortify the case by a more complete and

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Gold Claimed by Richmond Banks.

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formal statement, taken, I suggest, under oath, from that officer, embracing the facts mentioned in the papers referred to; and I should advise that the Department request its special counsel, (Charles Eames, Esq., as I understand,) in the class of cases to which the present belongs, to obtain from General Steadman answers to such interrogatories as may be propounded to him for the purpose of eliciting the facts within his knowledge and remembrance in respect to the property, and that it also request the special counsel to report upon the legal effect of the statements thus obtained.

I would also advise that the investigation and report of the counsel of the Department extend to the facts connected with the seizure or claim to the property stated to have been made, on behalf of the Freedmen's Bureau, at Washington, before the removal of the coin to Augusta.

If the result of the inquiry suggested should be that the coin, although under the control and in the possession, actual or constructive, of General Steadman, was not, at any time, seized by him, with intent that it should be appropriated as captured property, and that while it remained in his custody and possession such a character or quality was not impressed upon it by any antecedent seizure, the fact that the property was not captured, at the time the order of August 23d issued, may be taken as established.

If that fact be thus proved, and the President assumed the contrary, at the time he ordered the coin to be turned over to the Treasury agent, and did not design to direct any capture of it, independently of, and distinct from, that which may have previously occurred, I am of opinion that it is too late for the President to direct the owners of the coin to be placed in the same position in respect to the property that they occupied before his order to General Steadman was executed.

One other point in this case deserves consideration. It seems to be alleged that before, and at the time the order



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Gold Claimed by Richmond Banks.

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of August 23d was executed, the coin was under the protection of a "safe-conduct" from General Steadman; and it is claimed that the President had no power, or, if he possessed power, that it was a breach of good faith on his part to violate, or direct a violation, of that "safe-conduct!" Safe-conducts are documents granted in war to protect persons and property from the general operation of hostilities. The sovereign authority for the issuing of such instruments may be vested in military commanders, or in civil officers, either expressly, or by inevitable implication from the nature and extent of their general trust. "Such documents," says Wheaton, "are to be interpreted by the same rules of liberality and good faith with other acts of the sovereign power."

I am by no means persuaded that the coin in question was covered by the protection of any such document while it remained at Atlanta. General Steadman says that he gave the agent of the banks "safe-conduct for the coin to this place"—Augusta. When the property reached that city, it was liable and subject, so far as the evidence shows, to the general operation of hostilities, and might lawfully be captured.

If General Steadman, however, did attempt to extend to the coin protection against such liability, after the transit ceased, and while it was on deposit at Augusta, I suppose that the President had power to revoke his proceeding, and annul his intention of protection. Whether he in fact exercised the power in this case, or, if he did, whether he exercised it in the proper way, need not be considered, because I see no evidence to show that any extraordinary protection was intended to be extended to the coin by General Steadman at Augusta. If the fact be that that officer never intended to capture the coin, I do not see that he did any thing which could prevent his commander-in-chief from giving any order, with the utmost propriety, in respect to the property, that he might deem right, without a formal revocation of the previous action by the subordinate. If, however, the point in regard to the alleged safe-conduct

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should be insisted upon by the claimants in any future stage of the case, I would advise that General Steadman be interrogated as to the facts bearing upon it.

I have thus, in a rapid way, gone over what seems to me to be the material aspects of this case.

To recapitulate briefly, I am of opinion—

1. That the coin should be restored, if the President did not intend to direct the capture of the property, and it was not captured, in contemplation of law, before he issued his order of August 28, 1865.

2. That if the coin was captured property, in the hands of General Steadman, before, and at the time that order was issued, it should not be restored.

3. That if it should appear, on formal inquiry of General Steadman, that he did not seize the property with the intent to reduce it into the possession of the Government as captured property, and that the quality of captured property was not impressed upon it by any antecedent military seizure, the fact may be assumed that the property was not placed in that predicament, except through and by effect of the order of the President to which I have referred.

4. That the legal effect of the order of the President, and the action of General Steadman in pursuance of it, will depend upon the intention of the President at the time he issued it; and

5. That it does not appear that the coin was protected from the operation of hostilities by any subsisting "safe-conduct," at the time the President directed General Steadman to hand it over to the Treasury agent.

In reply to the second question propounded to me, I answer that if restoration of the property is made, it should take place under the authority and by the order of the President.

I may observe, as to the question of fact in regard to the intention of the President in directing the disposition given to the property under his order of August 23, 1865, that the intention not being clearly apparent on the face of the documents, nor under the evidence submitted to me, or in

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Gold Claimed by Richmond Banks.

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the possession of your Department, that it is one for the President himself to determine. I have already said that, *prima facie*, he designed to direct the capture of the property from all that appears prominently in the case; but that the President is competent to say, if the fact be so, that he merely intended to give statutory direction to property assumed by him to have been already captured, and liable in law to be dealt with as such.

One other remark ought to be made before I close. The President and the Department should be legally satisfied of the true ownership of the property before its restoration is made to the claimants. The officers of the banks have sworn that there existed no contract or dealing between the banks and the Confederate Government, by which the latter was entitled to, or had any interest in, one dollar of the money in question.

The circumstances under which the property left Richmond, before the evacuation of that place by the rebel forces, suggest a suspicion of ownership, or interest of some kind or other, in the *de facto* government which had dominated there for several years.

I think that the proper officers of the banks should make a further averment of proprietorship, embracing the substance of what is known as the test-oath in a court of prize, that will exclude and negative the idea of any ownership or interest in the rebel government.

If the banks are able to make such complete and solemn averment of ownership as I suggest, I think that the Government may accept it, in the absence of other claim, as legal proof of property.

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

Hon. HUGH McCULLOCH,

*Secretary of the Treasury.*

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Soule's Case.

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## SOULÉ'S CASE.

Advice as to the action proper to be taken by the Government to secure the determination of the questions arising in that cause.

ATTORNEY GENERAL'S OFFICE,  
*February 23, 1866.*

SIR: I have examined the papers submitted to me, with your letter of the 18th instant, relative to the proceedings instituted in the United States district court for the eastern district of Louisiana, to confiscate certain property of Pierre Soulé, and herewith return the same, with my views respecting the further action necessary to be taken by the Government, in order to secure the determination of the questions arising in that cause. It appears that an information was filed in the district court of the United States for the eastern district of Louisiana against one hundred and four lots of ground, the property of Pierre Soulé; that on July 24, 1865, the court entered a decree condemning the property as forfeited to the United States, and directed the same to be sold by the marshal; that subsequently, and before a sale of the property, this party appeared in court, and alleged, in what is called "a plea of pardon," that after the date of the decree of condemnation the President did grant unto him, Pierre Soulé, a full pardon and amnesty for all offences by him committed, arising out of participation, direct or implied, in the late rebellion, upon certain conditions, which he averred had been complied with, and he accordingly prayed that the judgment of condemnation be arrested, and execution barred, and the property libelled and in the hands of the marshal be restored to him; that on November 20, 1865, the court ordered that the district attorney show cause why the proceedings should not be discontinued, and the property in the hands of the marshal should not be restored to claimant on payment of costs; and that, on the 29th of November, 1865, the court ordered, adjudged, and decreed, that the information be

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Soule's Case.

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dismissed, and the property seized be restored to this party on the payment of the costs of the proceeding.

These being the facts connected with this proceeding, you ask my opinion "as to the validity of the decree for restoration, and as to the course to be pursued to retain possession of the property for the United States, if the decree be not valid."

You will at once perceive that the question presented, in the first branch of this inquiry, is one which the district court, having jurisdiction of the case, was entirely competent to determine, and that, being determined, the decision of the court must be regarded in the same light as the decision of any court, upon any question arising in a case of which it has jurisdiction, that is, it must be respected and obeyed by both parties, until, on appeal to a higher tribunal, the decision shall or may be reversed.

Any opinion, therefore, that either you or I may entertain, in regard to the legal effect of the pardon set up by Mr. Soule, after the rendition of the decree of confiscation, cannot avail to affect in any way the decision of the court pronounced on that question. If we should be of opinion that the court erred in deciding that the legal effect of the pardon was to entitle the claimant to restitution of the property, the decree of the court would stand as a valid decree, the opinion of the executive department of the Government to the contrary notwithstanding. If, on the other hand, we thought that the court gave due and proper effect to the pardon by the President, our views would not in law add anything of value to the judgment of the court.

The utmost that my opinion could do, would be to furnish, perhaps, some guide in determining whether an appeal should be taken from the decree of the district court. But I may say in this connection, that I have hitherto refrained from giving an opinion as to the legal effect of the President's pardon in the case of a proceeding under the confiscation acts. That question is an open one.

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Mortgage Bonds of Union Pacific Railroad Company.

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It has not yet been decided by the Supreme Court.\* I am disposed at present to go no further than to say, that if the public interests require that the execution of the decree of restitution in the case of this property should be suspended until the Supreme Court pass upon the question referred to, I think that there is enough of doubt in regard to the law of that question to warrant you in requesting that an appeal be directed to be taken on behalf of the United States by the district attorney at New Orleans.

If, therefore, you advise me that you desire that an appeal be taken from the decree of the district court, I will instruct the district attorney to apply to the court for an allowance of such an appeal.

The views now stated furnish, perhaps, a sufficient answer to the second branch of the inquiry made in your letter.

I understand that the property is in the custody of the marshal under his writ. It can only be retained in such custody by operation and effect of an appeal, which I apprehend will operate as a supersedeas as to the decree.

I am, sir, very respectfully,  
Your obedient servant,

JAMES SPEED.

Hon. EDWIN M. STANTON,  
*Secretary of War.*

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MORTGAGE BONDS OF UNION PACIFIC RAILROAD COMPANY.

Attorney General declines to give an opinion on the right of that company to issue mortgage bonds, at the request of its President.

ATTORNEY GENERAL'S OFFICE,  
*February 28, 1866.*

SIR: I beg to say, in reply to your letter of the 2d instant, covering a copy of a letter addressed to you by the President

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\*Since determined in a case under the act of August 6, 1861; (*vide* Armstrong's Foundry, 6 Wall., 769.)

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Confederate Debt.

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of the Union Pacific Railroad Company, that I am not able to see that the question stated in the letter of the President of the company, and on which he desires "the opinion of the Government or its legal adviser," is one that does or can arise in respect to any subject or matter of which your Department has jurisdiction. The rights of the Union Pacific Railroad Company, in respect to the issuing of mortgage bonds, are defined and determined by the acts of Congress. They cannot be varied or affected by the opinion or action of any Executive Department.

What those rights are may be seen by the company, as well as by the Government, on the face of the statutes; and if any difficulty arises in interpreting the statutes, the company may invoke the aid of competent professional men, whose opinions will be worth to the company as much as your judgment or my own.

Unless the matter is exhibited in some different light, I should advise you to decline, as I do, to give an opinion on the question stated by the President of the company.

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

Hon. JAMES HARLAN,

*Secretary of the Interior.*

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CONFEDERATE DEBT.

The payment of that debt by the United States or the States cannot be prevented by legislation.

ATTORNEY GENERAL'S OFFICE,

*February 28, 1866.*

SIR: In returning the despatch, dated January 18, 1866, of our consul at Liverpool, submitted to me with your letter of the 8th instant, I have the honor to say, that I do not see that it is possible to provide effectually by legislation against the payment, or recognition by, or on the part

Compensation of District Attorneys for Examining Titles.

of, either the United States or the States, of debts contracted in revolts against the Federal Government.

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

Hon. WM. H. SEWARD,

*Secretary of State.*

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COMPENSATION OF DISTRICT ATTORNEYS FOR EXAMIN-  
ING LAND TITLES.

1. A District Attorney is legally entitled to compensation for examining the title of lands purchased by the Government.
2. The amount of compensation may be agreed upon in advance, or may be fixed after the work is completed.

ATTORNEY GENERAL'S OFFICE,

*March 8, 1866.*

SIR: In reply to your letter of the 3d instant I have to say, that I am of opinion that the United States attorney for the northern district of Illinois, who made the examination of the titles of certain lands on Rock Island, mentioned in my letter of the 14th ultimo, is certainly entitled to compensation for his services in that regard.

I am not aware that anybody has ever doubted that a district attorney, who has examined the title of lands, in view of their purchase by the United States, and reported his opinion thereon, at the request of any head of Department, is entitled to a fee for the labor, skill, and responsibility expended and involved in the performance of that service.

The only point in regard to which there has ever been a diversity of opinion, so far as I know, is as to whether the compensation payable for that sort of service is to be regarded as demandable under the fee-bill of 1853, or independently of the provisions of that statute.

One of my learned predecessors, Mr. Cushing, was of opinion that the act of 1853 provides the fees only of the duties therein enumerated, of which the duty of examining the titles of lands was not one; and that, for the non-



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**Compensation of District Attorneys for Examining Titles.**

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enumerated duties respectively, the district attorney is entitled to have a fee either in the analogy of those fixed by the act, or at the sound discretion of the head of Department ordering the service. (7 Opinions, 46.) Another Attorney General, Mr. Black, held the view, that the act of 1853 provides the compensation for every service capable of being performed by a district attorney; and that for any service within the act the law officer could receive such compensation, and such only, as the fee-bill gives. It would seem, according to the opinion of Mr. Black, that the act of 1853 provides for the compensation of a district attorney both in cases where the authority and duty of the officer to act are derived from the law, and also in cases where his authority and duty spring from the request of a head of a Department. When a duty is enjoined upon him by the law of his office, and not merely by the request of a Department, he is bound to perform it, and take as compensation the fee mentioned in the statute. The authority of a district attorney to appear in all criminal prosecutions and in all civil suits in which the United States are a party of record, proceeds from the law establishing and defining the functions and duties of his office. In every such case, whether it be one of magnitude and importance, requiring an amount of professional skill and labor for which the compensation allowed by the fee-bill is altogether inadequate, or whether it be one of an entirely different character, the fee provided by the statute is the only compensation which the district attorney has any right to claim or receive. But, on the other hand, for every service rendered merely at the request of the head of a Department, the legal compensation allowed in the fee-bill is, according to one of its provisions, such sum as may be agreed on. (10 Stats. at Large, 101.)

This item determines, according to the view of the subject first presented, the compensation payable to a district attorney for services rendered at the request of heads of Department, in defending officers of the Government for official acts, in the examination of land titles, in preparing

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Compensation of District Attorneys for Examining Titles.

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reports upon applications for pardons, in taking depositions upon petitions for remission of forfeitures, and generally all professional services which the officers may be called upon to perform by the heads of the executive departments. (9 Opinions, 146.) It is not necessary that I should give an opinion respecting the relative merits of the respective views of the scope of the application of the fee-bill of 1853, entertained by the two learned gentlemen I have named, because both opinions agree in holding that a district attorney is legally entitled to compensation for performing the duty of examining, at the request of any executive department, the title of lands proposed to be purchased by the United States.

The amount of compensation payable in any particular case may be agreed upon before the service is performed, or it may be fixed, in the absence of stipulation, after the work is completed.

It seems right that I should say, that the allowance of the claim presented by Mr. Bass, in respect to the Rock Island land titles, should not be prejudiced in your Department by the circumstance that he made the examination of those titles not at your instance, but at mine. It would have been more in accordance with the custom in such cases, if you had obtained the opinion of the district attorney on the titles, and referred it to this office in connection with the abstracts. That was not done, and I deemed it right to do what I know you would have done had I made the request; namely, refer the abstract to the district attorney for his examination.

It would seem, therefore, to be proper, that you should adopt my request, and act in reference to his account, as if the service had been rendered solely at the instance of your Department.

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

Hon. EDWIN M. STANTON,

*Secretary of War.*

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Moore's Claim.

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## MOORE'S CLAIM.

The proclamation of the President of June 24, 1865, removing restrictions upon trade west of the Mississippi, took effect on and from the day of its date.

ATTORNEY GENERAL'S OFFICE,  
*March 14, 1866.*

SIR: By the petition of John S. Moore, referred to this office in your letter of the 25th of January, it appears that, on the 24th day of June, 1865, seven hundred and eighty-nine bales of cotton, the property of the petitioner, shipped to him from the west side of the Mississippi river, arrived at New Orleans, and that one-fourth of the cotton, one hundred and ninety-seven bales, was retained by the United States purchasing agent, under the authority of the act of July 2, 1864, section 8, and the regulations of the Treasury Department, made in pursuance of that statute. On the day of the arrival of the cotton at New Orleans, June 24, 1865, the President of the United States signed, and caused the seal of the United States to be affixed to, a proclamation, countersigned by the Secretary of State, declaring that all restrictions upon internal, domestic, and coastwise intercourse and trade, and upon the purchase and removal of products of States, and parts of States, and territories, theretofore declared in insurrection, west of the Mississippi river, were removed, and directing that they be "forthwith annulled."

The question presented for my consideration is, whether the President's proclamation took effect on the day of its date, or on the day after, June 25, when it was made public, and received in your Department?

It is admitted that, if it operated on the earlier day, the petitioner, Moore, is entitled to restitution of the amount of cotton collected by the purchasing agent on his shipment.

I have no doubt that the true rule applicable to a proclamation, like the one in question, is identical with that

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Moore's Claim.

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now in force, both in this country and in England, in regard to a public statute.

Such a statute, when duly made, takes effect from its date, if it does not otherwise provide. This was declared to be a settled doctrine by Mr. Justice Story, after a careful review of the English adjudications, in the case of the brig *Ann*, (1 Gall., 65;) and announced as the known rule, by the Supreme Court of the United States, in the case of *Matthews vs. Lane*, (7 Wheaton, 211.)

The day on which the signature of the President and the seal of the United States were affixed to the proclamation was the day on which the restrictions upon the trade, affected by the proclamation, were removed and annulled.

The solemnities of the sign manual of the President, and the seal of the United States, are conclusive evidence that, on the day they were performed, the President did the act declared in the proclamation. No other solemnity was required. No other act was needed to attest the exercise of power by the President. The transactions, as respects the removal of the restrictions, were choate and complete, when the signature of the President was affixed, and the proclamation was handed to the Secretary of State, with special warrant to affix thereto the seal that was to attest the verity of the presidential signature.

In this view of the proclamation, the fact that you were not personally or officially cognizant of its contents, until the day after it was signed, sealed, and enrolled among the records of the Government, is not of any legal consequence. It spoke for the first time on the day of its date. At the earliest moment of that day, in contemplation of law, it addressed the Secretary of the Treasury, as well as other officers concerned with its execution.

The principle is as well settled as any other in our jurisprudence, that, in a question as to the time when a law or a public act takes effect, there are no parts or divisions of a day, and that, therefore, the law or act relates to the first moment of the day on which it is done as if it were then done. This doctrine was directly applied by the

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Moore's Claim.

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Supreme Court in the case of *Arnold vs. The United States*, (9 Cranch, 104,) in which the question was, whether certain goods, imported on the 1st day of July, 1812, were subject to the double duties imposed by the act of 1812, approved by the President on the 1st day of July. The duties were leviable, by the terms of the act, upon all goods imported into the United States from and after its passage.

The court held, that the statute went into operation on the day of its approval, and took effect during the whole day.

The decision was, that goods imported on that day must be taken to have been imported after the passing of the act, and, of course, were liable to the double duties imposed by it.

I know of no reason in favor of the application of a different rule to an act of the President, done in pursuance of law, like the one declared in the present proclamation; and must hold accordingly, that the day on which it was performed is to be included in the computation of the time during which it operated.

It follows from these views, that I am of opinion that John S. Moore was entitled to restitution of the cotton collected on his shipment of the 24th of June, 1865, and mentioned in the claim presented to your Department.

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

Hon. HUGH McCULLOCH,

*Secretary of the Treasury.*

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Gray Jacket.

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## GRAY JACKET.\*

The Secretary of the Treasury has no power, under the 8th section of the act of July 18, 1861, to remit the forfeiture of a vessel or cargo, incurred under the law of war, on account of a breach of blockade.

ATTORNEY GENERAL'S OFFICE,  
March 15, 1865.

SIR: Your letter of the 29th of January propounds several questions, touching the authority of the Secretary of the Treasury, to remit under the 8th section of the act of July 13, 1861, entitled "An act further to provide for the collection of duties on imports, and for other purposes," the forfeiture, which has been judicially decreed, of the property involved in the case of the steamer "Gray Jacket."

That cause is at the present time pending, on an appeal taken by the claimants, in the Supreme Court of the United States, and the record presents it as the case of a vessel and cargo captured by a naval vessel of the United States, on the high seas as prize of war, libelled as such in the district court for the eastern district of Louisiana, and as lawful prize, condemned by final decree of that court.

The claimant and owner of the property had been, for thirty years previous to the capture, an inhabitant of one of the revolted States. His allegation is, that although the vessel with her cargo, was, at the time of capture, in fact, bound on a voyage from the blockaded port of Mobile to Havana, the object of the voyage was to effectuate the removal of his property from the enemy's country, and to sever forever his relations with the confederacy.

The question, whether, in any case of the capture of property, *jure belli*, brought within the prize jurisdiction, and condemned by a court of the United States, in the exercise of that jurisdiction, the Secretary of the Treasury may entertain an application for remission under the statute of 1861, is a question of great interest and importance.

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\*The general doctrine of this opinion was affirmed by the Supreme Court, *The Gray Jacket*, (5 Wall., 369.)

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Gray Jacket.

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In regard to this vessel, which was liable to forfeiture, under the 6th section of the statute of 1861, as well as subject to condemnation, for breach of the blockade of Mobile, I have only to say that, even if the Secretary of the Treasury may exercise under the statute, authority to remit the forfeiture of a vessel owned by a resident of one of the insurgent States, and found on the high seas, which has been proceeded against and condemned, in a prize court on account of ownership, I am of opinion, as at present advised, that he cannot exercise that jurisdiction, in the case of such a vessel thus proceeded against and condemned, which was also confiscable for breach of blockade.

The "Gray Jacket" sailed from Mobile in violation of the blockade of that port; she was therefore confiscable in a prize court. The fact that she was confiscable on account of ownership, did not render her any the less liable to condemnation for breach of blockade. I do not discover any tenable ground on which to repose the power of the Secretary of the Treasury, under the statute of 1861, to remit the forfeiture of a vessel incurred, under the *jus belli*, on account of a violation of the blockade. Even if he could remit the forfeiture superinduced by ownership, he could not mitigate the legal consequences which followed from the conduct of the vessel in respect to the blockade and its laws.

These remarks also embrace the application in respect to the cargo of the "Gray Jacket," which was equally with the vessel confiscable for violation of the blockade of Mobile. But in respect to that interest, a further observation may be made, which, independently of the views just expressed, excludes any idea of the legal application of the statute of 1861 to the present cargo.

I do not perceive any ground, whatever, on which the jurisdiction of the Secretary of the Treasury, to remit, is capable of being legally supported, in the case of a cargo not "coming," at the time of capture, from an insurrectionary State or section "into the other parts of the United States," or "not proceeding to such State or section" from the rest

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Gray Jacket.

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of the United States. In other words, I am very clearly of opinion, that whatever may be the extent of the jurisdiction conferred by the 8th section of the act of 1861, upon the Secretary of the Treasury, it does not extend to the case of any cargo not impressed at the time of capture with such a destination as would render the property, if seized on land, liable to forfeiture, under and by virtue of the 5th section of the act.

I have read the petition presented to you in the case of the "Gray Jacket." I do not perceive that the case of the cargo is brought, by the admissions therein made, within the 5th section of the act of 1861. There is no allegation that the cargo was "proceeding" at the time of capture from an insurrectionary State to the rest of the United States.

As at present advised, therefore, I am of opinion, that for this reason, as well as that depending on breach of blockade, in which the cargo and vessel were both involved, the jurisdiction of the Secretary of the Treasury cannot lawfully be exercised in respect to the present cargo.

The last question asked in your letter is, "whether the present is a proper case for an exercise of any authority to remit, that you may possess." If you have in law, the power to remit, the question whether it would be justifiable to exert it in any particular case, is one which cannot be determined by strict legal rules or principles. The matter is wholly within your discretion.

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

Hon. HUGH McCULLOCH,  
*Secretary of the Treasury.*



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Case of Hiram Saul.

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## CASE OF HIRAM SAUL.

A pensioner residing in an insurrectionary State, who did not take up arms against the United States, or give encouragement to the rebellion, is entitled, upon the termination of the hostile relation, to be paid the pension money due him from the time the rebellion began.

ATTORNEY GENERAL'S OFFICE,

*March 17, 1866.*

SIR: In your letter of the 30th of December, 1865, the receipt of which I have the honor to acknowledge, and which, till now, I have not been able to answer, because of my engagements in court, you state that Hiram Saul was, prior to the rebellion, a pensioner of the Government, and that he received his pension up to the 4th of March, 1861; but since the President's proclamation of the 16th of August, 1861, his name, together with the names of all other pensioners residing in the States declared to be in rebellion, has been regarded as stricken from the pension-rolls by operation of the act of 4th of February, 1862.

You further state that Saul has established the fact of his loyalty, during the rebellion, to the satisfaction of the Department, and otherwise complied with its rules and regulations, and that his name has been recently restored to the rolls.

You ask me whether, under that state of facts, the Department should now pay to Saul his pension from the 4th of March, 1861, the date of the last payment to him.

When a state of war existed between the people of the States, who were proclaimed to be in rebellion, and the national Government, under and by the laws of war, as well as by the act of the 13th July, 1861, all commercial intercourse betwixt the people so in rebellion, and the rest of the people of the United States, was interdicted and became unlawful. That there were many true and loyal people who resided and remained within the territory declared to be in rebellion is undoubtedly true, but by the laws of war and the act of Congress they were made and

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Case of Hiram Saul.

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declared to be public enemies, and intercourse with them was unlawful. One of the greatest hardships and evils growing out of a state of war is, that the innocent are involved with the guilty. To be a public enemy is not to be a criminal, and yet the public enemy, who is void of crime, may, as an enemy, suffer more than the public enemy who is also a traitor. Such may be the fortunes of war as to individuals. The wit of man has not thus far been able to divine and prescribe a rule by which such consequences of war can be avoided.

By the laws of war then, as also by the provisions of the act of the 13th July, 1861, and the proclamation of the President made in pursuance thereof, the Department of the Interior was forbidden from paying any pensioners of the Government, whether loyal or disloyal, who resided and remained within the territory which was under the dominion of the rebels, so long as the war continued, and all commercial intercourse was interdicted.

The provisions of the act of Congress, entitled "an act authorizing the Secretary of the Interior to strike from the pension-rolls the names of such persons as have taken up arms against the Government, or who may have in any manner encouraged the rebels," approved 4th February, 1862, (12 Stats., 337,) relieve me from the necessity of expressing an opinion upon the question, whether taking up arms against the Government, encouraging rebels, or manifesting an interest in their cause, would of itself, and without any legislation upon the subject, forfeit a pension. That act makes it the duty of the Secretary of the Interior, "to strike from the pension-rolls the names of all such persons as have or may hereafter take up arms against the Government of the United States, or who have in any manner encouraged the rebels, or manifested a sympathy with their cause." Ordering that the names of such persons shall be struck from the pension-rolls, is equivalent to an order that they shall not be paid; and, on the other hand, it is an order to the Secretary not to strike from the pension-rolls the names of persons who have not taken, or

The Meteor.

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who may not take up arms against the Government, or in any manner encourage the rebels, or manifest a sympathy with their cause, and is tantamount to an order that their names shall remain on the pension-rolls, and that they shall be paid. By this act Congress has sought to be just to all the pensioners of the Government who shall remain faithful and true, although for a time, and without any fault of theirs, they must be regarded as public enemies. As enemies all intercourse with them, under the laws of war, and by the act of Congress, and the proclamation made in pursuance thereof, was suspended, but by the act of 4th February, 1862, their rights are saved, and when intercourse became lawful, their right to demand payment was revived, and it became the duty of the Government to pay.

It is my opinion that, inasmuch as Hiram Saul has not offended, by taking up arms against the Government of the United States, or in any manner encouraging rebels, or manifesting sympathy with their cause, he still has a right to his pension, and that as commercial intercourse is now lawful with the people in his State, that his pension should be paid in full from the date of the last payment.

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

HON. JAMES HARLAN,

*Secretary of the Interior.*

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THE METEOR.

The District Attorney should not be instructed, in this case, to consent to the bonding of the vessel.

ATTORNEY GENERAL'S OFFICE,

*March 30, 1866.*

SIR: I have the honor to acknowledge the receipt of your note of this date, together with a letter from Mr. Evarts, and one from Mr. Dickinson.

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The Adeldo.

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Mr. Evans, in his letter, proposes that the district attorney be instructed to assent to an order for the bonding of the "Meteor," which has been seized and libelled in the district court for the southern district of New York, for an intended breach of neutrality laws; and that the owners shall, on their part, consent that the boat shall be sold at public auction in the city of New York, but reserving the right to make claim on the Government for damages, because of the illegal detention of the boat.

I do not think that such bond and arrangement should be made. The whole arrangement is predicated upon the idea that the detention was wrongful. The Government is asked to acknowledge that fact without a trial.

If facts have come to light since the seizure showing that it was wrongful, the libel should be dismissed, and the vessel restored to the owner. If, however, subsequently-discovered facts only make it doubtful whether the boat was rightfully seized, I do not see what possible good would come from the arrangement. The slight saving in the amount of damages would be no compensation for the direct acknowledgment that the seizure was illegal.

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

Hon. Wm. H. SEWARD,  
*Secretary of State.*

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THE ADELDO.

1. After condemnation of a vessel libelled in prize, the President cannot affect the decree by directing a discontinuance of the proceedings.
2. The President cannot, by any exercise of his pardoning power, remit or mitigate the forfeiture of property confiscable as prize of war.

ATTORNEY GENERAL'S OFFICE,

April 2, 1866.

SIR: Agreeably to your request, I have examined and considered the application and accompanying papers, pre-

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The Adelso.

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sented to you by Edgar Tucker and Henry Whitin, of New York, and John MacRae and Donald MacRae, of Wilmington, North Carolina, for the dismissal of the proceedings now pending against the cargo of the schooner "Adelso," condemned as prize of war by the United States district court for Rhode Island, and for the restoration to them of the proceeds of the sale of that cargo.

The schooner "Adelso" and cargo were condemned, in the Rhode Island district, on November 13, 1861, as prize of war, and, on appeal to the circuit court for that district, the sentence was affirmed. The claimants thereupon appealed to the Supreme Court; but, failing to appear and prosecute their appeal, when the case was reached on the call of the docket, it was dismissed by the court.

The President is now asked to interpose some supposed authority, conferred upon him by the Constitution or laws of the United States, and restore to the claimants the proceeds of the condemned property. Has he such power? That is the legal question I am now to answer:

It is manifest, in the first place, that the result desired by the claimants could not be attained by a discontinuance of the proceedings instituted against the property. Those proceedings have ripened, so to speak, into a judgment of the court. They have performed their function. They invoked the action of the judicial power of the Government, and that power has acted. The result is a judicial decree. That decree must stand until it is reversed, in due course of law, by the same authority that gave it birth. The very court that rendered the judgment could not set it aside, or open it. It is capable of being affected only by a decree of the appellate court.

Prior to condemnation, the President might, perhaps, have directed the local law officer to discontinue the proceedings in prize. Such action on the part of the Executive might have removed the cause from judicial cognizance. But, subsequently to condemnation, I know of no executive authority which could be directly exerted upon the judicial proceedings in the case, so as to impair

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The Adelson.

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the efficiency<sup>\*</sup> of the decree, or affect any one of its legal consequences.

It may be contended, however, that the President has power to remit the forfeiture to the claimants. There is no statute conferring upon the President the general authority to remit forfeitures. If he possesses it, it must be that he has it by virtue of that clause of the Constitution which empowers him "to grant reprieves and pardons for offences against the United States."

While it may not be susceptible of a doubt that the President has power to remit or mitigate any forfeiture of property, incurred or decreed, for any offence against the United States, and which is imposed by law as punishment for such an offence, I do not believe that the grant of power to the President embraces that class of cases, in which the law declares property to be forfeited, altogether irrespective of, and without reference to, the personal conduct of those who own or control it; cases, in other words, in which the forfeiture accrues solely as the result and in virtue of the predicament in which the property may be found, the relations it may sustain towards the Government, and the character or quality which that predicament, or those relations, affix to it. The confiscability of property captured and brought to adjudication, *jure belli*, stands precisely upon those grounds. The theory on which all proceedings in prize are founded and conducted is, that the property involved is "enemy's property."

The question of liability to confiscation in a prize court, administering and enforcing the law of nations, is always a question, whether the subject of capture is the property of enemies? The converse of this proposition is also true, as an eminent prize judge has explained. The inquiry, "whether the subject of capture is enemy's property is always, in a technical form, the question of confiscability in a prize court." (Op. of Cadwalader, J., in "The Parkhill.") Within this designation falls the property of all residents of hostile places, without discrimination in favor of those who may owe allegiance to the government of the captors,

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The Adelsco.

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or even in favor of such of these as maintain the most friendly and loyal feelings for that government.

The prize courts, in adjudicating upon property of such ownership, institute no inquisition into the personal deportment or sentiments of the proprietors. In the case of the "Venus," (8 Cranch, 280,) the Supreme Court condemned, as "enemies' property," merchandize owned by a citizen of the United States residing in England, and shipped from that country for America before any knowledge of the declaration of war.

The cases in which the English prize courts condemned supplies shipped from, and actually owned in, Great Britain, for the purpose of relieving the distresses of British subjects in Granada, who were under the temporary subjection of the French, during the period of our revolutionary war, proceeded upon the ground, that the supplies were constructively French, and, therefore, "enemies' property." (1 Rob., 207.) The property was owned by people in Ireland, who were, no doubt, perfectly loyal to the British Crown. If it had been owned by starving and loyal Granadians, the same decree would have been pronounced.

The cases in which property is condemned as constructively hostile, on account of trading with enemies, do not proceed upon any ground of personal hostility or blame imputable to its owners. They are considered enemies, in the particular transactions, "by fiction, or rather by intendment of law." (5 Rob., 176.) If a citizen or a subject of a belligerent State undertake to remove from the enemy's territory property acquired long before hostilities, and it is captured at sea, it will be condemned, by operation of the rule against intercourse with enemies, and as within the designation of hostile property. (8 Cranch, 163.) The owner may have intended no wrong, and his conduct, in a moral sense, may have been entirely blameless.

The owner of a vessel violently contravening a belligerent right of search in time of war is, *pro hac vice*, an enemy, as

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The Adeldo.

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also the proprietors of a ship that breaks a lawful blockade. (1 Rob., 340; *Ib.*, 90.) Both may be friends, and yet their property is deemed, in the particular transactions, impressed with a hostile character.

Without referring to any more examples of the application of the doctrine I have mentioned, it is clear that the judicatures by whom it is administered do not take into consideration, as an element of any legal importance, the character of the person whose property is prosecuted as hostile, either absolute or relative, as viewed by the municipal law of the country, or the conduct of those persons, according to the code of laws administered by the ordinary tribunals of the Government. A man may become a traitor by holding commercial intercourse with enemies, but even where it stamps a hostile character on property, such intercourse does not necessarily involve or imply personal guilt or criminal responsibility.

In no case of that character does the prize court adjudge or consider the personal liability of the party whose property is before it for judicial action. It takes no cognizance, because it has no jurisdiction of that subject.

Prize courts are tribunals of the law of nations, and the jurisprudence they administer is a part of that law. (Wheaton, part iv, chap. 11.) They deal with cases of capture as distinguished from seizures, which are adjudged by the courts constituted for the enforcement of the municipal law. Their decrees are decrees of condemnation; whereas those of other courts, in proceedings *in rem*, are decrees of forfeiture. "Capture" and "condemnation" are words of technical significance in courts of prize, as are "seizure" and "forfeiture" in the formulary of legal expression appropriate in tribunals administering municipal law, and enforcing statutory remedies against property.

The prize courts adjudicate the character and relations of the things, whether vessels or cargoes, brought within their jurisdiction. The municipal courts, in dealing with



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The *Adelso*.

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cases of forfeiture, mainly judge of the acts of persons, and determine whether offences have been committed which superinduce the confiscation of property.

The purpose of naval warfare and maritime capture is not to enforce penalties with a view to the infliction of punishment upon offenders. Their object is to destroy the wealth of hostile places, with a view to the reduction of the power of enemies, and the attainment of the ends for which hostilities are prosecuted; hence it is that the courts, constituted to adjudicate suits arising from hostile maritime capture, consider in all cases whether, and to what extent, the property contributes to the wealth of hostile territory, and condemn or restore according to a code of principles framed for the determination of those questions. The property of friend as well as foe, of the innocent as well as the guilty, is swept to condemnation by the application of the rigorous rules of the prize law. If a man happens to own land in an enemy's country, though he be a neutral friend domiciled in a friendly territory, the produce of that land is condemned as hostile. (9 Cranch, 191.) He is considered an enemy, as proprietor of a part of the enemy's soil. He is a part of that country in the particular instance, independently of his personal residence, occupation, or conduct. So, if a neutral person have a share in a mercantile house in the enemy's country, the property representing it will be capturable and condemnable as enemies' property; and, upon the same principle, a merchant of the hostile country, interested in a house of trade in a neutral country, cannot maintain, before a prize court, a claim for his share of captured property owned by the neutral house. (Wheaton, 573-575.) Without proceeding further with this line of remark; when the prize court for the Rhode Island district rendered judgment of condemnation against the cargo of the schooner "*Adelso*," it is clear that it simply declared, that the property was within the legal designation of enemies' property. The judgment affirmed nothing in respect to the personal conduct

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Purchase of Arms from Neutrals.

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or sentiments of the claimants. Those of them who lived in North Carolina were enemies by domicile. (2 Black, 635.) Those of them who resided in Boston, if they owned an interest in the cargo, were enemies, *pro hac vice*, with reference to the seizure of this particular property, which was concerned in the trade of enemies. The Supreme Court has recently decided, that property of a northern man, taken in hostile trade, before the act of July 18, 1861 went into effect, was confiscable. (The Herald and Cargo, 8 Wall., 768.) No one of the claimants was guilty of any "offence against the United States" in owning or shipping this cargo. There is, therefore, nothing in the case on which the President's pardon, granted in the terms of the Constitution, could operate.

I am clearly of opinion that the President cannot, by any exercise of the pardoning power, remit or mitigate the forfeiture and condemnation of the present cargo, or entitle the petitioners to demand restitution of its proceeds.

I find, let me say in conclusion, that this precise question was submitted by the President to my learned predecessor, Mr. Bates, and that he held, as I do, that the President has no power, by pardon or otherwise, to remit the forfeiture of property regularly condemned in a prize court of the United States. (10 Opinions, 452.)

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

The PRESIDENT.

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PURCHASE OF ARMS FROM NEUTRALS.

Belligerents have the right to purchase arms in a neutral country, and to ship them therefrom at their own risk.

ATTORNEY GENERAL'S OFFICE,

March 24, 1865.

SIR: I have the honor to acknowledge the receipt of your note of the 23d of March, together with a copy of a letter from Mr. Romero, the minister of the Mexican Re-

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Purchase of Arms from Neutrals.

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public. Mr. Romero says that he has been informed that agents of the "usurper Maximilian" have purchased, in New York, five thousand muskets, and that they are to be shipped to Vera Cruz, not "as private property, but for account of the said usurper." Mr. Romero asks that the shipment be not allowed. You ask my opinion, whether there is any law or regulation now in force prohibiting the exportation of arms for the account of any person, whatever be his political designation, real or assumed, or of any government.

This question is fully answered in my opinion, delivered to you on the 28d day of last December.

The opinion of the 28d of December was given upon a complaint of Mr. Romero, that General McDowell, commanding the military department of California, had prohibited the exportation of arms or munitions of war, by the frontier, into Mexico. That opinion is to the effect that General McDowell's order was unlawful.

I can perceive no difference in principle between that case and this. So far as neutrals are concerned, belligerent parties are equals.

I know of no law or regulation which forbids any person or government, whether the political designation be real or assumed, from purchasing arms from citizens of the United States, and shipping them at the risk of the purchaser.

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

Hon. WM. H. SEWARD,

*Secretary of State.*

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Claim of State of Iowa.

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## CLAIM OF STATE OF IOWA.

The Secretary of the Interior has no power, under the act of July 12, 1862, to set apart to the State of Iowa, from the public lands within her limits, an amount equal to so much of the alternate sections of public lands, in a strip five miles wide on each side of the Des Moines river, between its mouth and the Raccoon Fork, as was sold or disposed of by the United States at the date of the act of August 8, 1848.

## ATTORNEY GENERAL'S OFFICE,

*April 6, 1866.*

SIR: You have asked my opinion on a question touching the construction and effect of the act of July 12, 1862, entitled "An act confirming a land claim in the State of Iowa, and for other purposes." (12 Stats., 543.)

That act extends the grant of lands made by the act of August 8, 1846, to the then Territory of Iowa, for the improvement of the Des Moines river, so as to include the alternate odd-numbered sections lying within five miles of the river, between the Raccoon fork and the northern boundary of the State. The statute then provides as follows: "If any of said lands shall have been sold, or otherwise disposed of, by the United States, before the passage of this act, excepting those released by the United States to the grantees of the State of Iowa, under the joint resolution of March 2, 1862, the Secretary of the Interior is hereby directed to set apart an equal amount of lands within said State, to be certified in lieu thereof."

The question is, Whether, under the provision just cited, the Secretary of the Interior must set apart and certify to the State of Iowa, from the public lands lying within her limits, an amount equal to, and in lieu of, so much of the alternate sections of public lands, in a strip five miles in width, on each side of the Des Moines river, between its mouth and the Raccoon fork, as was sold, or otherwise disposed of, by the United States at the date of the act of August 8, 1846?

The agents of the State of Iowa contend that this question should be answered in the affirmative. I am very

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Claim of State of Iowa.

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clearly of opinion that a negative answer is the proper one. It is too plain to admit, for one moment, of a serious doubt, that the act of 1862 confers no authority upon the Secretary of the Interior to indemnify the State, in the manner contemplated and required by the statute, for any lands except those contained in the alternate sections (designated by odd numbers) lying between the Raccoon fork and the northern boundary of the State, and which shall have been sold, or otherwise disposed of, by the United States before the passage of the statute. To extend the application of the act so as to make it cover those lands lying within five miles of the Des Moines, between its mouth and the Raccoon fork, granted by the act of 1846, but disposed of by the Government before its passage, would be, it seems to me, to take a most unwarrantable liberty with the statute. I am the more convinced of this since I have read the very acute and ingenious argument by which the representatives of the State of Iowa support her claim.

In my opinion, the language of the act of 1862 is not fairly and reasonably susceptible of two constructions. It clearly and explicitly provides for the setting apart of lands in the State at large, to be certified to the State, to compensate her for so much of the alternate and odd-numbered sections of lands embraced by the grant of 1862 as at the date of the statute were disposed of by the United States. It was in lieu of those lands, and those only, that an equal amount of lands within the State was authorized and required to be set apart.

An attempt is made, in the able argument on behalf of the State, to fuse the two statutes of 1862 and 1846, and then to read the second paragraph in the act of 1862, that preceding the proviso, as if the words "said lands" referred to all the lands embraced by the two grants. I appreciate the ingenuity of this view of the case, but I do not assent to its correctness. The Supreme Court decided, in 23 Howard, 66, that the grant of 1846 was confined to lands lying between the mouth of the Des Moines and the Rac-

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 Liability of Marshals for Fees.
 

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coon fork. It required a new exercise of power by Congress to give the State lands which lay above the Raccoon fork and below her northern boundary. The result of that exercise of power is the act of 1862. It contains a fresh and substantial, although a supplemental, grant of lands; and when the statute says, that if any of "said lands shall have been sold, or otherwise disposed of, by the United States," other lands of equal amount shall be certified in lieu thereof, it is to be taken to mean any of the lands granted by it, and not those lands, as well as the other lands granted in the statute of 1846. What, then, are the lands granted by the statute of 1862? Certainly none other than the lands contained in the "alternate sections (designated by odd numbers) lying within five miles of said river, between the Raccoon fork and the northern boundary of the State."

I am of opinion that the claim of the State should be rejected.

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

HON. JAMES HARLAN,

*Secretary of the Interior.*

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## LIABILITY OF MARSHALS FOR FEES.

1. A Marshal must account for the fees which he earned and failed or neglected to collect.
2. Without special legislation for his relief, a Marshal cannot receive a credit, in his accounts, for fees which he was unable to collect, by reason of the insolvency or non-residence of the parties.

ATTORNEY GENERAL'S OFFICE,

*April 6, 1866.*

SIR: In your letter of the 30th of March, 1866, you inform me that Ward H. Lamon, Esq., late marshal of the United States for the District of Columbia, claims a credit in his accounts, for fees which he has earned, but has not collected, and you ask me—

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Liability of Marshals for Fees.

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“1st. Must the marshal account, not merely for the fees which he has actually received, but for those which he earned, but which he has failed or neglected to collect?”

“2d. Is he, without a special act of Congress for his relief, entitled to a credit to the amount of the fees not collected, where the payment thereof could not be enforced by reason of the insolvency or non-residence of the parties from whom they were due? and, if yea, who is authorized to give such credit?”

In an opinion delivered by Attorney General Cushing, on the 19th of December, 1855, (7 Opinions of Attorneys General, 610,) it is said to be the duty of the clerk of the courts in the district to collect all fees, in cash, just as it is the duty of the Commissioner of Patents to do, or of deputy postmasters, in regard to the postage on letters; that if the clerk gives credit for any fees, he does that at his own risk, and if they be not paid, the loss devolves on him alone; and that, if any deficiency thus arises, he cannot claim indemnity of the Government; and that, on the contrary, he is obliged to make account of all such fees, and if, by reason thereof, a surplus fails to exist, then the clerk is chargeable with such deficiency at the Treasury of the United States.

Such was Attorney General Cushing's construction of the act of February 26, 1853, (10 Stats. at Large, p. 166.) The part of the act so construed by Attorney General Cushing is the same in reference to marshals. In the construction so given I concur. This opinion by Attorney General Cushing was afterwards affirmed by him in an opinion of the 12th August, 1856, (8 Opinions of Attorneys General, p. 36.)

Mr. Attorney General Black, in an opinion delivered June 22, 1858, concurs in the opinion of Attorney General Cushing, in so far as it makes the marshal and clerk chargeable with all the fees earned. But, in the concluding paragraph of his opinion, Attorney General Black says: “I think, therefore, that while he (the marshal) is chargeable with all the fees and emoluments of his office, he may

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Liability of Marshals for Fees.

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entitle himself for credit for such of them as he shows that he could not recover by any reasonable effort which he might have made. But the fact that the fees were uncollectable must be made to appear by evidence satisfactory to the accounting officers, before the credit can be lawfully given."

These opinions of Attorneys General Cushing and Black agree in this: that the marshal must be charged with all fees earned, whether realized or not. The first question propounded by you, then, is directly answered by the opinion of both of those learned gentlemen, in which I concur.

The view expressed by Attorney General Black, in the last paragraph of his opinion, was not pertinent to the question before him. The question propounded to him was, whether the marshal should be charged with the fees that accrued to him during the period covered by his account, or only such as he actually received. I take it for granted, therefore, that he had not patiently and carefully examined the question whether accounting officers had authority to give credits to the marshal for fees which he had neglected or failed to collect.

It is certain that no Department of the Government can give such credits without there be authority therefor in the statute. I can find none such, either express or implied. Mr. Lamon may be equitably entitled to relief, and for the purposes of this argument it may be admitted that he is. But from what source is he to obtain relief? I think by a special act of Congress only. Neither the head of a Department nor any accounting officer has authority to give him the desired credit.

I find by an act entitled "An act to provide for the settlement of the accounts of John A. Smith, clerk of the circuit court and criminal court of the District of Columbia," approved May 26, 1862, (12 Stats. at Large, 408,) that Congress authorized the accounting officers of the Treasury not to hold the clerk responsible for any fees or charges not actually collected by him from the parties liable therefor, whenever the failure to make such collection shall be



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Arey's Case.

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shown to result from the insolvency, non-residence, or other inability of the parties liable therefor; and it makes the affidavit of the clerk, as to the diligence used to collect the fees, accompanied by a certificate of the district attorney, that he believes the money could not be collected, sufficient proof for the allowance to the clerk for all fees and charges not actually collected by him. I regard this act as a congressional declaration that my construction of the act of 1853 is the true one. The marshal, therefore, can only get relief by a like statute.

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

Hon. JAMES HARLAN,

*Secretary of the Interior.*

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AREY'S CASE.

1. The master of a vessel is a "mariner" within the meaning of the 2d and 4th sections of the act of February 28, 1803.
2. He is entitled, if a citizen of the United States, to three months' additional wages on being discharged in a foreign port, as in the case of a like discharge of any other seaman or mariner.

ATTORNEY GENERAL'S OFFICE,

*April 9, 1866.*

SIR: I have the honor to acknowledge the receipt of your letter of the 26th of March, 1866, together with a despatch of Isaac J. Allen, Esq., United States consul at Hong Kong, China. From that despatch it appears that Robert B. Arey, a citizen of the United States, was the master of the ship "Mary Glover," owned by citizens of the United States; that whilst the said ship was at Hong Kong, China, the owners discharged Robert B. Arey from the office of master, and placed Captain Chase in command thereof. Robert B. Arey appears to have had a continuing contract with the owners of said vessel. Upon the surrender of the vessel by Arey to Captain Chase, he (Arey) demanded three months' additional pay. Upon that state

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Arey's Case.

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of fact, you ask me whether, on the discharge of a ship-master, by order of the owners, in a foreign port, from a continuing contract, without notice, three months' wages may be demanded, as in case of a like discharge of any other seaman or mariner, being a citizen of the United States.

The object of the 3d and 4th sections of the act of Congress, entitled, "An act supplementary to the act concerning consuls and vice consuls, and for the further protection of American seamen," approved February 28, 1803, (2 Stats., 203,) are, first, to discourage discharges of American seamen in foreign ports; and, secondly, to encourage and aid mariners and seamen of the United States, in foreign countries, to return to the United States. To accomplish these objects, the 3d section of the act requires—

1st. That when a ship or vessel belonging to a citizen of the United States shall be sold in a foreign country, and the ship's company discharged, there shall be paid to the consul, vice consul, commercial agent, or vice commercial agent, three months' wages, over and above what may be then due to each of the company.

2d. That when a seaman or mariner, a citizen of the United States, shall, with his own consent, be discharged in a foreign country, from a ship owned by a citizen of the United States, he (the discharged seaman or mariner) shall have three months' additional wages to what was due at the time of the discharge.

3d. The consul or commercial agent is directed to pay to each seaman or mariner so discharged, upon his engaging on board of any vessel to return to the United States, two-thirds of the money received, because of the discharge of the seaman or mariner; and

4th. To retain the remaining third for the purpose of creating a fund for the payment of passages of seamen or mariners, citizens of the United States, who may desire to return to the United States, and for the maintenance of American seamen who may be destitute, and who may be in such foreign port.

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Arcy's Case.

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The payment of the three months' additional wages is of course a charge upon, or debt due by, the owner of the vessel sold, or from which the seaman or mariner may be discharged. A citizen of the United States who sells his ship or vessel in a foreign country, or from whose ship or vessel a seaman or mariner is discharged in a foreign country, with his consent, is as much bound to pay the three months' additional wages as to pay the wages actually due at the time of the sale or discharge. The owner knows, or ought to know, of this burden or charge upon him at the time he makes the sale or grants the discharge, and ought not, therefore, to complain of its operation. The case before me is not one in which the vessel has been sold in a foreign country; and, therefore, I have no occasion to express an opinion as to what character of sale is required, under the statute, to impose such a burden upon the owners. Nor is it necessary or proper that I should say whether the master or commander of a vessel sold in a foreign country is entitled to the additional pay.

The present case is one where a commander, a citizen of the United States, has been discharged, with his own consent, in a foreign country, from a vessel owned by a citizen of the United States, and it comes directly under the second division of the act of Congress, as hereinbefore mentioned.

Is the master or commander of a ship or vessel a seaman or mariner, within the meaning of this branch of the act? If he is a seaman or mariner, he is clearly entitled to the three months' additional pay, and must contribute one-third thereof to the fund created for the relief of destitute seamen and mariners, and, when destitute, he can obtain relief from that fund. On the other hand, if he is not a mariner or seaman, he contributes nothing to that fund, and can claim nothing from it.

The word "mariner," as used in this branch of the statute, is generic, and includes all sea-faring persons engaged in navigating vessels, from the highest to the lowest, no matter what may be their sex, character, situation, color, or position.

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Arey's Case.

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Masters of vessels constitute the highest class of mariners, and I can see no good reason why they should be excluded from the operation of the statute, as betwixt the owner and all persons employed on the vessel. The relation is one of owner on the one side, and mariner on the other. The statute seeks to discourage owners from discharging mariners in foreign countries, by making it burdensome for them to do so, and encourages mariners so discharged to return.

If it be said that the statute makes it the duty of the master or commander to produce to the consul the list of a ship's company, and make payment therefrom, I answer, that the in-coming captain or master must produce the list, and make payment, because of the discharge of the previous master with his consent. The master is a mariner within the meaning of the statute.

I am, therefore, of opinion, that a ship's master, being a citizen of the United States, having a continuing contract, being discharged by the owners, citizens of the United States, in a foreign country, may demand additional wages, as in case of a like discharge of any other seaman or mariner, being a citizen of the United States.

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

Hon. WM. H. SEWARD,  
*Secretary of State.*

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Claim of Union Pacific Railroad Company.

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**CLAIM OF UNION PACIFIC RAILROAD COMPANY.**

The Union Pacific Railroad Company, Eastern Division, cannot, after the expiration of three years from the date of the act of July 1, 1862, abandon the original route from Fort Riley to the 100th meridian, and claim the withdrawal from pre-emption, entry, and sale, of lands within fifteen miles of a proposed new route designated on a map filed in the Department of the Interior.

ATTORNEY GENERAL'S OFFICE,

*April 16, 1866.*

SIR: I entertain no doubt that, inasmuch as more than three years had elapsed from the date of the passage of the act of July 1, 1862, when the Union Pacific Railroad Company, Eastern Division, designated the proposed new route of its road, and filed a map of the same in your Department, you have no authority to cause the lands within fifteen miles of that route to be withdrawn from preëmption, entry, and sale.

I do not say, for it is unnecessary that I should, what your authority and duty would have been if the company had, within three years from July 1, 1862, abandoned the route designated on the map filed June 23, 1864, from Fort Riley to the 100th meridian, and had designated, within that period, a new route, and filed a map thereof in your Department, crossing the 100th meridian south of the south border of the valley of the Platte, and connecting with the Union Pacific Railroad westwardly of its initial point. But I am perfectly clear in my opinion, that after the expiration of three years from the date of the act of July 1, 1862, the company had no right to designate a new and different route from that previously adopted and designated on the map of June 23, 1864, and claim thereupon that the lands within fifteen miles of the designated new route be withdrawn from entry and sale.

This view of the case presents a very plain and obvious solution of the question before you, and I will very briefly give you the reasons on which it is based.

The act of July 1, 1862, in its 7th and 9th sections, re-

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Claim of the Union Pacific Railroad Company.

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quired the Union Pacific Railroad Company, and the Leavenworth, Pawnee, and Western Railroad Company, of Kansas, of which the present company is the successor, to designate, respectively, the general routes of their roads, and file maps of the same in the Department of the Interior, within two years after the passage of the act: "Whereupon," the statute provided, "the Secretary of the Interior shall cause the lands within fifteen miles of said designated route or routes to be withdrawn from preëmption, private entry, and sale." (12 Stats., 493.)

The period for designating the routes of the roads and filing the maps was extended by the 5th section of the amendatory act of 1862, (13 Stats., 358,) and then the 9th section of the act of 1864 provided, "that any company, authorized by this act to construct its road and telegraph line from the Missouri river to the initial point aforesaid, may construct its road and telegraph line so as to connect with the Union Pacific Railroad at any point westwardly of such initial point, in case such company shall deem such westwardly connection more practicable and desirable; and in aid of the construction of so much of its road and telegraph line as shall be a departure from the route hereinbefore provided for its road, such company shall be entitled to all the benefits, and be subject to all the conditions and restrictions, of this act." (13 Stats., 360.)

Now, in reading these statutes, with the view of determining the question before us, we must treat the 7th section of the act of 1862, amended by the 5th section of the act of 1864, as if it had originally provided that the company should, within three years after the passage of the act of 1862, designate the general route of its road, and file a map of the same in the Department of the Interior; and we must further read the 9th section of the act of 1862, amended by the provision of the 9th section of the act of 1864, just cited, as if it had enacted that the company in question might construct a railroad from the mouth of the Kansas river to the initial point of the Union Pacific Railroad, on the 100th meridian, or construct its road so as to

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Claim of the Union Pacific Railroad Company.

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connect with that railroad at any point westwardly of its initial point. That was the option, it would seem, intended to be conferred by Congress upon the present company. We may assume that it might exercise its discretion alternately, either to construct a road from the Missouri, at the mouth of the Kansas, to the initial point of the main-trunk line, on the 100th meridian, or construct a road with that line, at a point westwardly of its initial point, upon that meridian.

Reading the statute as I have suggested, what do we discover? A plain and peremptory provision, that within three years after the passage of the act of July 1, 1862, the company in question shall designate the general route of its road, as near as may be, and shall file a map of the same in the Department of the Interior. That duty being performed, it became the duty of the Secretary of the Interior to cause the lands—the words are, “shall cause the lands — within fifteen miles of the designated route to be withdrawn from entry and sale. The lands were not required or authorized to be withdrawn from the market until a map of the designated route was filed; such a map was not authorized to be filed after the expiration of the time limited in the statute.

The statutory provision, that the general route “shall” be designated on a map filed in the Department within three years, is the legal equivalent of a provision, that the designation of the route upon such a map should not be made after that time; at least with any view to the exercise thereafter, by the Secretary of the Interior, of the power conferred upon him, which was made dependent for its lawful exercise upon the requirement imposed upon the company being fulfilled in due season.

The requirement under consideration was not done away with by the act of 1864. That act extended the time for its performance, and conferred a discretionary authority upon the company to connect with the Union Pacific Railroad Company either at the initial point on the 100th meridian, or westwardly of that meridian. The duty re-

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Claim of Union Pacific Railroad Company.

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maintained, after the passage of the act, with the Secretary of the Interior, to see that the statutory condition or requirement had been complied with, in respect to the designation of the route within the time limited, before withdrawing the public lands upon the route from the market. Whatever route was selected, the company was required to designate it, and file a map of it in the Department within three years. Then, and then only, did the company acquire a right to require the withdrawal of the public lands along the route of the road from entry and sale.

I will not consider whether any company, who had once made a designation of the route of its road, and filed a map in the Department, could, after the lands along such route had been withdrawn from the market, and within the time limited in the statute, designate a new route, and require the same action to be taken in respect to the lands along it. I give no opinion on that case, because it is not the one presented by the facts, in respect to the action of the company in question. The company did not, until February 21, 1866, present to the Department a map of the new route, west from Fort Riley, by the Smokey Hill. If that map had been filed within three years from the date of the act of 1862, a different question, and one on which I express no opinion, would have arisen in respect to the right of the company, and the duty and authority of the Secretary of the Interior. Nor do I conceive that the fact that, within two years limited by the act of 1862, the predecessor of the present Union Pacific Railroad Company, Eastern Division, designated the general route of the road—which was, in fact, substantially coincident with that afterwards adopted and designated by its successor—takes the case of their company out of the rule of the statute. If it had a right to change the general route designated by the Leavenworth, Pawnee, and Western Railroad Company, that right, in view of the statute, was not exercisable after the expiration of three years from July 1, 1862. It might well be contended, that the 5th section of the act of 1864,



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Claim of Union Pacific Railroad Company.

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extending the time for filing the map to one year, and the 9th section of the same act, enabling any company authorized to construct its road from the Missouri to the initial point, between the south margin of the Republican valley and the north margin of the Platte valley, to cross the 100th meridian, so as to connect with the main-trunk line westwardly of that initial point, authorized the Pacific Railroad Company, Eastern Division, to designate a route substantially like the one described in the map presented in February, 1866, and to file a map of the same within the extended time, and authorize the Department, on those requirements being fulfilled, to withdraw the lands within fifteen miles of the new route from the market. But it cannot, with any success, or even plausibility of argument, be contended that, after the expiration of the extended time, such a designation of a new route could be made with reference to the withdrawal of the public land from entry and market.

The amendatory act of 1864 did not confer upon any company, whether it had filed its map within the two years limited by the act of 1862, or required the extension granted by the amendatory statute, a right to postpone its final designation of a route, and the filing of the map of that route, until after the expiration of the extended time.

If the company who brought itself within the act of 1862 was in a worse position, in respect to changing the location of its road, than the company who had not complied with the requirements of the 7th section of the act of 1862, it was certainly in no better position. Neither company could require the Secretary of the Interior to cause the lands to be withdrawn along any route not designated within the three years.

On the case stated in your letter, I am, therefore, clearly of opinion, that you cannot, without further authority of the law, withdraw from preëmption, private entry, and sale, the lands upon the suggested new route of the Union Pacific Railroad, Eastern Division, as indicated in the map

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Swamp Grant to State of Iowa.

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and communication transmitted to your Department, on February 21, 1866, by the President of the company.

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

Hon. JAMES HARLAN,

*Secretary of the Interior.*

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SWAMP GRANT TO STATE OF IOWA.

1. The State of Iowa is entitled to the purchase-money of swamp lands within her limits, which were entered with cash prior to the passage of the act of March 3, 1857.
2. She is also entitled to indemnity in land, for such swamp lands as were located with warrant or scrip prior to the passage of that act.

ATTORNEY GENERAL'S OFFICE,

*April 20, 1866.*

SIR: I have given to the legislation referred to in your letter of the 30th day of January last, relative to the "swamp grant" to the State of Iowa, careful consideration.

I am of opinion that the State has a good legal claim; first, to the purchase-money of the public lands therein, which were entered with cash prior to the passage of the act of March 3, 1857, and which she may be able to prove, to the satisfaction of the Commissioner of the General Land Office and the Secretary of the Interior, were swamp lands within the true intent and meaning of the act of September 28, 1850; and, second, to indemnity in land, for the public lands therein which were located, with warrants or with scrip, prior to the passage of the act of March 3, 1857, and which she may, in like manner, show were swamp lands within the true intent and meaning of the statute of 1850.

In reviewing the legislation adduced by the State in support of her claim, I have diligently sought for the intention of Congress in the words of the statutes. This I

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Swamp Grant to State of Iowa.

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have done, not only because to look elsewhere for the intent of the legislature is to violate a fundamental canon of statutory construction, but also because I have keenly felt that, in a case of this character, speculation in regard to the meaning of Congress, based upon considerations extraneous to the statutes, would not advance, but only retard, the discovery of that meaning.

The act of September 28, 1850, "to enable the State of Arkansas and other States to reclaim the swamp lands within their limits," I dismiss with the remark, that in my view of the present question, it is not important to determine the character and effect of the grant made by that statute. The present question arises upon the construction and effect of the two subsequent statutes of March 2, 1855, and March 8, 1857. If the claim of the State of Iowa is not maintainable upon these laws, it must fall. If they support it, I know no subsequent legislation which invalidates it. It is needed, therefore, to look critically into the acts of 1855 and 1857; and I propose now to state very briefly what, according to my legal view, is found in those laws.

The act of March 2, 1855—"An act for the relief of purchasers and locators of swamp and overflowed lands," (10 Stats., 634)—contains two sections. The 1st section authorizes all persons who had made entries of public lands, claimed as of that character, with cash or warrants, before the issuing of patents for the same lands to the States, to demand their patents.

The 2d section required to be paid over to the States respectively the purchase-money of such of these lands as had been sold and purchased, and provided indemnity in like amount of the public lands for such as had been located by warrant or scrip, upon due proof that any of the lands thus purchased or located were swamp lands within the meaning of the act of 1850. I think that the provisions of this act applied only to past cases of sales and locations. The phraseology employed does not embrace any other. There may be good grounds on which

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Swamp Grant to State of Iowa.

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to contend that Congress ought, in justice to the States for whose benefit the act of 1850 was passed, to have provided a permanent measure of indemnity, embracing not only past, but also future cases of sales. However that may be, the inquiry here and now is what Congress did, not what it ought to have done; and looking at the words, and the words only, of the statute, for an answer to that question, I cannot discover in them the expression of an intention to give the States the money realized by the Government on sales of swamp lands within their limits, occurring subsequently to the date of the enactment.

I now come to the statute which presents the only difficulty in the case, the act of March 3, 1857. (11 Stats., 251.) Without that law the claim of the State could not be sustained. It is, to say the least of it, a most ambiguous act. This, together with the fact that your Department seems always to have regarded it as adverse to the right of the State, in respect to her present claim, has caused me no little anxiety in giving construction to it. The opinion of the Land Office, affirmed by eminent gentlemen at the head of the Interior Department, on a question touching the interpretation of a law of this character, especially when that opinion has become a rule of action in the administration of the Department, is undoubtedly entitled to great respect. I should be inclined to give it controlling effect in a case where a doubt arose which could only be resolved by the view that had received the sanction of the Department. This, however, I am always to consider—that my duty, in every case submitted to me, is to give my own opinion on the question it presents. I have no right to adopt that of any one else, unless it is agreeable to my views of the law. The fact that my opinion, on a question of statutory interpretation, is disapproved by the authority of contemporaneous construction in the Department whose duty it is to execute the statute, ought in every case to induce me to review the grounds of my own judgment with more than ordinary care and caution; to take time for reflection; to consider well all the opposing

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Swamp Grant to State of Iowa.

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views; and, finally, in a proper case, to give the Department the benefit of any reasonable well-founded doubt as to the proper view of the case. *Contemporanea expositio est fortissima.* But, if after this has been done, I am not able to concur in the view of the Department, my duty is, as I have suggested, to give what I am requested and required to give—my own opinion on the question. That opinion, however, may or may not be adopted. It is always a question of administrative discretion whether it shall be. The Department has the right to respect it, or refuse to act on it, in a proper case, without submitting the subject to the consideration of Congress. With these general observations, I proceed to state the views which I entertain in regard to the construction and effect of the act of March 3, 1857.

I cannot concur with the Land Office in the opinion that the right of the State to the indemnity provided by the 2d section of the act of 1855, in connection with the proviso to the act of 1857, depends upon whether the selections of the lands, as swamp and overflowed lands, were made and reported to the Commissioner of the General Land Office prior to the passage of the act of 1857. In the construction of a statute, it is an established rule, that the intention of the legislature is to be deduced from a view of the whole, and of every part, of the statute, taken and compared together. No part of it should be made void; full sense and meaning must be given to every clause and provision. As Lord Kenyon said, in regard to a will: "One spells, as it were, every word, to get at the intention." If the statute contain an enacting clause, a saving clause, and a proviso, they must all be taken into view, and construed together. The saving clause is not to be rejected, unless it is directly repugnant to the body of the act, and cannot stand without rendering the act inconsistent and destructive of itself. If the statute contain a proviso, it must be held not to repeal the purview, unless flatly repugnant to, and manifestly inconsistent with, the purview. The real intention must govern in every case, and prevail over the literal sense

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Swamp Grant to State of Iowa.

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of the terms. But the intention must be such as the legislature has used fit words to express, and the spirit is to be collected from the letter. "The longer I sit here," said Sir John Coleridge, "the more I feel the importance of seeking only the meaning of a statute according to the fair interpretation of the words, and acting on that." (6 A. & E., 7.)

I have endeavored to obey these canons in giving construction to the act of 1857. We have in that act an enacting clause and a proviso, so-called, to be considered. The office of a proviso is to take special cases out of the general enactment, and provide specially for them. "In its abuse," says Dwarrris, "it contains all unconnected matters, and disposes of whatever is incapable of combination with the rest of any clause." The meaning of this proviso, however, is equally clear, on the face of it, whether we regard it as containing what that part of an act regularly ought or ought not to contain. It would have been more regular, perhaps, if the proviso had, in this case, constituted a separate section of the statute. But that is unimportant. No different effect can be given to it from that which it would receive if it stood apart from the purview. Now, what are the provisions of the body and the proviso of the statute? The first declares, "that the selection of swamp and overflowed land, granted to the several States, heretofore made and reported, so far as the same shall remain vacant and unappropriated, and not interfered with by an actual settlement under any existing law of the United States, be, and the same are hereby, confirmed, and shall be approved and patented, to the said several States, in conformity with the provisions of the act aforesaid, (1850,) as soon as may be practicable after the passage of this law." There is not a word in all this provision which has any reference or relation to swamp lands which may have been purchased by private individuals, or located by warrant or scrip, prior to the date of the act, or to any right, claim, or demand of the States to, upon, or in respect to, such lands, or the proceeds thereof, or other equivalent

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Swamp Grant to State of Iowa.

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land. It provides only for the issuing of patents to the States, and the lands for which patents are directed to be issued are swamp lands, which are vacant, unappropriated, and unsettled, and which were selected and reported to the Government as of the character of lands granted by the act of 1850, prior to the 3d of March, 1857. Under this provision, the State could maintain no claim to the moneys realized on sales of swamp lands made before or after that date, whether the lands sold were selected and reported as being of that description prior thereto or not. We come now to the proviso. It declares that the act of March 2, 1855, is "hereby continued in force, and extended to all entries and locations of lands, claimed as swamp lands, made since its passage." I think that no greater effect should be given to the words "hereby continued in force," than if the provision had been, that the act of 1855 is "hereby re-enacted," but that the same effect must be given to them as if that had been the language of the proviso. What, then, would have been the construction of this proviso, if it had declared the act of 1855 to be re-enacted? It is a general rule of construction, that clauses of reference, incorporating the provisions of former statutes, take effect as fully as if they had been repeated and re-enacted in the body of the latter act, with relation thereto. (Dwarris on Statutes, 602.) If we give, then, the same effect to the act of March, 1855, as if it had been in terms repeated and re-enacted on the 3d of March, 1857, we find that the cases of sales and locations of lands, claimed as swamp lands, which had occurred prior to March 3, 1857, and subsequent to March 2, 1855, are fully comprehended, and then we have a substantive provision made on the 3d of March, 1857, that the purchase-money of any of the lands sold, which the States may prove to be swamp lands within the meaning of the act of 1850, shall be paid over to the States, and that indemnity, in other equivalent land, shall be given for those lands of the character mentioned, which were located by warrant or scrip. The grant was not exclusively of the purchase-moneys of those swamp

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Swamp Grant to State of Iowa.

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lands which had been selected and reported before March 3, 1857. Patents were directed to be issued for these, if they were unappropriated and unsettled. But the grant, by effect of the proviso, was of the purchase-moneys of all lands claimed as swamp lands which had been sold by the Government prior to March 3, 1857, and which the States could prove were of the character of lands granted by the original act of 1850. We have no more right to import into the proviso, from the purview of the act, the words of limitation that are found there, than we would have to incorporate into the act of 1855 a provision that the lands purchased or located, for which the States, under that act, were entitled to indemnity, shall have been selected and reported as swamp lands to the Government before March 2, 1855.

It is fully implied in what I have said, that the provisions of the act of 1855, thus in effect re-enacted on the 3d of March, 1857, must be held to be strictly retrospective, as of that date, according to the view which I have expressed in regard to the statute of 1855.

While I affirm, therefore, the validity of the claim of the State of Iowa, under this legislation, to the purchase-moneys of the public lands within her limits sold between March 2, 1855, and March 3, 1857, and which you may determine were swamp lands within the meaning of the act of 1850, and to indemnity in lands for the lands located with warrant or scrip during that period, which you may likewise determine were swamp lands according to the true intent of that statute, I dismiss, as without legal merit, under the legislation referred to, any claim for indemnity for lands within that designation which were sold or located subsequently to March 3, 1857.

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

Hon. JAMES HARLAN,

*Secretary of the Interior.*



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Jurisdiction of Consular Courts in Japan.

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## JURISDICTION OF CONSULAR COURTS IN JAPAN.

1. A United States Consular Court in Japan cannot, in the case of a suit by a person not a citizen of the United States against an American merchant, entertain a plea of set-off further than to the extent of the claim asserted by the plaintiff.
2. Such a court cannot, under the treaty with Japan and the statutes of the United States, render a judgment against a person of foreign birth not a citizen of the United States.

ATTORNEY GENERAL'S OFFICE,

*April 21, 1866.*

SIR: I have the honor to acknowledge the receipt of your letter of January 10, 1866, together with a despatch, No. 20, dated May 30, 1865, from the United States consul at Kanagawa, relative to a case tried by the consular court at that place.

From that despatch, it appears that Adrian & Co., Dutch merchants, brought an action of debt in the consular court against Schultz, Reis, & Co., American citizens. The defendants in the action, Schultz, Reis, & Co., pleaded a set-off, and the consul rendered judgment in favor of the defendants against the Dutch merchants for \$1,952 65.

Upon these facts, you ask me the following questions:

1. "Is the law of 'set-off' properly to be recognized in a consular court of the United States?"
2. "As the consular court at Kanagawa is the creature of the treaty with Japan and the statutes of the United States, can it render judgment against a person of foreign birth, not a citizen of the United States, in Japan?"

Your first question is a general one, and applies to all cases which may be brought for debt before a consular court in Japan, no matter who may be the parties thereto.

In an action between citizens of the United States, in the consular court in Japan, the doctrine of "set-off" certainly applies; not so, however, when the subject of another country is plaintiff.

By the 6th article of the treaty betwixt the United States and the empire of Japan, it is provided, that "Amer-

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Jurisdiction of Consular Courts in Japan.

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icans committing offences against Japanese shall be tried in American consular courts, and, when guilty, shall be punished according to the American law. Japanese committing offences against Americans shall be tried by the Japanese authorities, and punished according to Japanese law. The consular courts shall be open to Japanese creditors, to enable them to recover their just claims against American citizens; and the Japanese courts shall, in like manner, be open to American citizens, for the recovery of their just claims against Japanese."

It will be perceived that the high contracting powers understood, either that consular courts existed in Japan by usage and custom, or that they had their existence and derived their powers from statutes of the Government of the United States. They are spoken of as tribunals which had then a rightful and lawful existence.

The legislation of the Government shows that consular courts had been established in the countries long before the treaty with Japan was concluded. It is fair to infer, that the Japanese Government intended to concede to the Government of the United States the right and power to create consular courts in Japan with as broad or as limited jurisdiction as the United States might deem proper, except as to matters of controversy betwixt Japanese and Americans.

I do not think, however, it can be fairly inferred, from this article of the treaty, that it was within the contemplation of the parties that the Government of the United States should confer upon American consular courts in Japan jurisdiction over the subjects or citizens of other countries resident in Japan.

Turning from the treaty to the statute entitled "An act to carry into effect provisions of the treaties between the United States, China, Japan, Siam, Persia, and other countries, giving certain judicial powers to ministers and consuls, or other functionaries of the United States in those countries, and for other purposes," approved June 22, 1860. (12 Stats., 72,) we find, by the 1st section of the

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*Jurisdiction of Consular Courts in Japan.*

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act, that, in addition to other powers and duties imposed upon ministers and consuls, they shall be invested with the judicial power described in the statute, which shall appertain to the office of minister and consul, and be a part of the duties belonging thereto, wherein the same is allowed by treaty. The 3d section says, that the jurisdiction of the consular courts shall embrace all controversies between citizens of the United States and others provided for by such treaties respectively; and the 4th section declares, that the laws of the United States, so far as is necessary to execute such treaties respectively, shall extend to all citizens of the United States in the said countries, and over all others, to the extent that the terms of the said treaties respectively justify or require, so far as such laws are suitable to carry the said treaties into effect. These provisions of the statute, in my opinion, extend to the laws of the United States over citizens of the United States resident in Japan, and fully invest the consular courts of Japan with authority to hear and determine all matters of controversy arising between citizens of the United States. Under the treaty with Japan, the Government of the United States had the authority to give such jurisdiction to consular courts.

I do not think that either the treaty or the statute confers express jurisdiction upon consular courts, either to exercise criminal or civil jurisdiction over persons in Japan who are not citizens of the United States or subjects of the Japanese empire; and, if the question were an open one, I should doubt whether a consular court, established under the act of Congress, could entertain a suit by a Dutch subject against a citizen of the United States; but I find that, in a very able and learned opinion, delivered by Attorney General Cushing, he has expressed the opinion, that, under the treaty with China, a suit may be brought by an Englishman or Frenchman in an American consular court of the United States against an American citizen. That opinion was delivered September 19, 1855. (7 Opinions, 518.) The treaty with Japan was concluded

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Jurisdiction of Consular Courts in Japan.

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at the city of Yedo, on the 29th of July, 1858, and exchanged at the city of Washington on the 22d of May, 1860, and proclaimed the next day by the President. (12 Stats., 1051.) That treaty was doubtless made with reference to the opinion as given by Attorney General Cushing; and, when the words "consular courts" were used in the treaty, they were used doubtless in reference to the courts as described in his opinion. And the act of Congress, before referred to, is almost a copy of the act upon which Attorney General Cushing commented in his opinion. I find in the "United States Consul's Manual," published in 1856, and which is in the hands of consuls of the United States, that the opinion of Attorney General Cushing is set down as the law for their government.

Considering, then, the date of the Japanese treaty, the act of Congress, the opinion of Attorney General Cushing, and the fact that the Consul's Manual lays it down that consular courts have jurisdiction of controversies wherein citizens and subjects of other countries are plaintiffs and citizens of the United States are defendants, it would not be proper now to consider the question as an open one.

But that does not dispose of the question of jurisdiction upon a plea of "set-off." Set-off is a cross-action—a suit wherein the defendant becomes the plaintiff, and the plaintiff in the original suit the defendant. Courts derive their powers from the law, and not from the consent of parties. Arbitrators are made by the parties. The law makes the courts. Arbitrators can submit what they please for award. Courts cannot take jurisdiction of matters, except as authorized by the law. This is true of courts of limited jurisdiction, and especially true in regard to courts that exist under treaties between independent countries, and exercising powers in a country in which the judge of the court is a foreigner, owing no allegiance there, and whose power exists only by the courtesy of the country in which he exercises the functions of his office. The maxim that a court should amplify its jurisdiction for the sake of justice, does not apply to a court of limited juris-

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Billups's Cotton.

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diction, and ought not to apply to a court existing under a treaty, and exercising its authority in a foreign country. A jurisdiction to hear and determine a complaint made by the subject of another country against a citizen of the United States, does not confer jurisdiction for a cross-action in a consular court. So far as set-off is a defence, it may bepleaded.

I am of opinion, therefore, upon the case submitted, that a consular court could not entertain the plea of set-off further than the extent of the claim asserted by the Dutch merchant; and, secondly, that the consular court could not, under the treaty with Japan, and the statutes of the United States, render a judgment over against a person of foreign birth, not a citizen of the United States, in Japan.

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

Hon. WM. H. SEWARD,

*Secretary of State.*

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BILLUPS'S COTTON.

A lot of cotton was seized by a Treasury agent in the belief that it was the property of the rebel Government. The proofs showed that it was private property; that it was never captured by the military forces; that it was not abandoned, or taken as captured or abandoned property. *Held*, that the owner was entitled to restoration of the cotton.

ATTORNEY GENERAL'S OFFICE,

*April 24, 1866.*

SIR: I have the honor to acknowledge the receipt of a bundle of papers containing the claim of Colonel John S. Williams, for three hundred and thirty-four bales of cotton seized by the Treasury agents, with an endorsement that they are for my consideration.

As no legal question has been asked, I suppose it is intended that I should express an opinion as to the legality and propriety of holding the cotton seized by the

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Billups's Cotton.

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Treasury agents. The facts, as disclosed in this bundle of papers, are substantially as follows :

The three hundred and thirty-four bales of cotton were the property of Joseph P. Billups. When Billups was from home, having left authority with no one to sell and dispose of this cotton, his father assumed authority to make a contract with the so-called Confederate Government for it. Under the contract so made by the father, the cotton was entered upon the books of the Confederate Government as the property of that Government. Joseph P. Billups, as soon as informed of this pretended contract by his father, repudiated and denied it. No agent of the Confederate Government ever had possession of the cotton. It continued to remain in the possession and under the control of Joseph P. Billups, or his agents. After the fall of the so-called Confederate Government, and the surrender of its armies, and after Joseph P. Billups had been pardoned by the President, the Treasury agents seized the cotton as the property of the Confederate Government, because they found it entered upon the books of that Government. Prior to this seizure by the Treasury, Billups had sold the cotton to Colonel John S. Williams.

This cotton was not captured by the military forces of the United States, and turned over by them to the Treasury agents, nor was it seized by Treasury agents as abandoned property, but the Treasury agents took it, believing it to be the property of the Confederate Government. If it was, in truth, the property of the Confederate Government, the Treasury agents were right in seizing it, and, *prima facie*, it was their property. But if it was not the property of the Confederate Government, if it was not abandoned property, and if it had not been captured by the army of the United States, the agents of the Treasury Department would not do right in holding the cotton. The agents, though right in making the seizure, cannot be justified in holding on to the property, after it is made manifest by the proofs, as in this case, that the cotton did not fall within any of the predicaments before mentioned.

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Cooke's Foundry.

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As the cotton was not the property of the so-called Confederate Government—had, in fact, never become a part of the common fund upon which the rebellion rested, and was neither abandoned nor captured—I think it should be restored.

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

The PRESIDENT.

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COOKE'S FOUNDRY.

This property should be proceeded against for forfeiture in the proper United States Court in Georgia, and the claimant remitted by the Secretary of War to that forum for the ascertainment of his rights under the pardon granted him by the President.

## ATTORNEY GENERAL'S OFFICE,

*April 25, 1866.*

SIR: I have carefully examined the papers submitted to me with your letter of the 16th instant, relative to the claim of one F. L. Cooke, surviving partner of the firm of Cooke & Brother, of Athens, Georgia, to certain property, consisting of real estate and machinery, employed during the war in the manufacture, as alleged, of arms and war-like stores for the use of the rebel government. This property was seized by our military forces in May, 1865, and is still in their possession. Mr. Cooke, his brother and partner being deceased, has been pardoned by the President; and he now claims that he is entitled, under his pardon, to be restored to the possession and enjoyment of the real estate and personal property under seizure, belonging to the late firm.

The application, in view of the facts of the case, so far as they are ascertained, suggests two questions: one in regard to the ownership of the property, and the other touching the legal effect of the President's pardon. In the letter addressed to you by the attorney of Mr. Cooke, it is

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Cooke's Foundry.

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stated, that the so-called Confederate States held a lien upon the property, created to secure the performance, on the part of Cooke & Brother, of certain contracts, entered into with them by the rebel government. This lien, it is alleged, "has been extinguished, or nearly so, by performance," on the part of Cooke & Brother. Now, I think it highly inexpedient that the executive department of our Government should decide the effect of the contracts mentioned, or of the lien which is admitted they created on the property in question. Moreover, I think that, even if the proprietorship of the property were clearly shown to have been in the Georgia firm, it would be better that the questions touching the legal effect of the pardon referred to should be adjudicated by the courts of the United States, which are about being opened again in Georgia. The facts connected with the property, real as well as personal, warrant the belief, that it is all forfeitable, under the act of August 6, 1861, as having been used and employed in aiding the late insurrection.

I would advise, therefore, that the case be referred to the United States attorney for the district of Georgia, with the request that he proceed according to law against the property, real and personal, under the acts of August 6, 1861, and July 17, 1862. In that proceeding, the claimant will be entitled to intervene, and obtain a judicial determination of his rights. On all accounts, I recommend this course as the one which will best conserve the interests and rights of the claimant, as well as of the United States.

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

Hon. EDWIN M. STANTON,

*Secretary of War.*

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Bankers' Cases.

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## BANKERS' CASES.

Bankers, doing business as brokers, are liable to pay, under the 99th section of the act of June 30, 1864, duties upon all their sales, whether for the benefit of themselves or of others.

## ATTORNEY GENERAL'S OFFICE.

*May 4, 1866.*

SIR: It appears to me clear, under the statutes of internal revenue, and the recent decisions of the Supreme Court in the "Brokers and Bankers' Cases," that bankers who negotiate sales of stocks belonging to others are denominated "bankers doing business as brokers," and are liable, respectively, to pay the prescribed duties upon the amount of all such sales.

In the case of the *United States vs. Cutting, et al.*, the question was, whether sales by brokers of their own stocks, exchange, bullion, coined-money, bank-notes, promissory-notes, and other property were subject to duty. In expounding the statutes, the Supreme Court regarded the amendment, made by the act of March 3, 1865, to paragraph 9, of the 79th section of the act of June 30, 1864, which defines, for the purposes of the law, the term "broker," as in effect an amendment of the 99th section of the act of 1864, which prescribes the duties leviable upon the sales by brokers of stocks and other securities. It was therefore held in that case, that sales made by brokers for themselves were subject to the same duty as those made for others. (8 Wall., 441.)

In the case of the *United States vs. Fiske, et al.*, the question presented for determination was, whether bankers "doing a general business as such," who sold Government securities for themselves, and not for others or for a commission, were subject to pay upon such sales the duty prescribed by the 99th section of the statute of 1864? The Supreme Court held that they were not so liable. (8 Wall., 445.) The decision proceeded, as would appear, upon the ground that the defendants were not "bankers doing busi-

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Bankers' Cases.

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ness as brokers," within the meaning of the statute. "The purpose and intent of the legislature, in the amendment made to the 9th paragraph of section 79," said Mr. Justice Grier, in delivering the opinion of the court, "was evidently not to change the correct definition given of the term 'broker,' and to make it mean that every man who sold his own securities was a broker, and liable to pay \$50 for a license. The obvious purpose of the amendment was to compel brokers to render an account of all sales made, whether for themselves or others, and to pay duty on them. As is often the case in statutes, though the intention is clear, the words used to express it may be ill chosen. The evil intended to be remedied by the amendment was transparent. If the amendment had been properly expressed, it should have been added as a proviso to the 99th section, which relates to the rates of duty to be paid on sales made in the stock-market by brokers or others licensed and doing business as such."

It seems to me a corollary, from the propositions affirmed by the Supreme Court in these adjudications, that a person doing a general business as a banker, who at the same time prosecutes the business of selling stocks and other securities, for others as well as for himself, is liable to pay tax upon all his sales. So long as his sales are limited to his own securities, his transactions do not become those of a broker. But when, in addition to such sales, he negotiates sales of securities for others, he engages in the business of a broker, and becomes a banker doing business as a broker. A broker, and a banker doing business as a broker, stand on precisely the same footing in the statute. Both are mentioned in the 99th section as subject to the payment of the same duties upon the sales of the kinds of property there enumerated. The Supreme Court has settled, as we have seen, that brokers are liable to pay duties on all their sales—those of their own property, as well as those of the property of others. Bankers, therefore, "doing business as brokers," would seem to be subject to the same liability. They are chargeable, under the pro-

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Steamer A. G. Brown.

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visions of the 99th section of the statute, with the payment of duties upon all their sales. The exemption of bankers' sales of their own securities from duty is maintainable only, I think, when the bankers do not prosecute or carry on business as brokers; in the case of those who, in other words, do not engage in the business of negotiating purchases or sales of securities for the benefit of other parties. But no exemption can be claimed by bankers who engage in such business in favor of sales which they may negotiate of their own securities. The statute requires them, in my opinion, to make the same returns of sales as are made by brokers, and subjects them to the liability of paying, like brokers, duties upon all sales of stocks and securities by them negotiated, whether for the benefit of themselves or of others.

I am, sir, very respectfully,  
Your obedient servant,

J. HUBLEY ASHTON.

Hon. HUGH McCULLOCH,  
*Secretary of the Treasury*

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STEAMER A. G. BROWN.

Where a steamer was seized by a military force in an insurrectionary State, and remained in such custody till the termination of hostilities, without an adjudication by a court of prize, and without being turned over to a Treasury agent, it was *held*, that the President might lawfully restore the vessel to the owner.

ATTORNEY GENERAL'S OFFICE,  
May 15, 1866.

SIR: On the 23d ultimo you referred to this office certain papers filed in your Department, in the case of the steamer "A. G. Brown," and desired to be advised of the opinion of the Attorney General on two questions arising in that case.

This vessel was seized on or about the 20th of April, 1863, by our military forces, without naval co-operation, while lying at a wharf at Gainesville, on the Pearl river, in

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Steamer A. G. Brown.

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the State of Mississippi, and has been since in use by the quartermaster's department of the army. No steps, it appears, have been taken to obtain an adjudication upon the capture, or to place the case within the jurisdiction of the Court of Claims, as established by the "captured and abandoned property act" of March 12, 1863. She is claimed by one William G. Poetevent, who asks that she be restored to him. Poetevent, according to the papers before me, was, at the time of the seizure of the vessel, a resident of Mississippi. A hostile character was impressed upon him and his property by such residence, unless the United States, at the date of the capture, had substantial, complete, and permanent military occupation and control of the district of the State in which the alleged owner was domiciled. (The Venice, 2 Wall., 259.)

If the condition and status of that part of Mississippi had not been previously changed through the restoration of the national authority, this vessel was liable, in April, 1863, to capture as enemy's property, independently of any circumstances connected with her past or intended employment, or of any personal complicity on the part of her owner with the rebellion.

It is not necessary that I should determine what disposition, in due course of law, should have been made of the property by the captors, or what disposition might, at the present time, be made of it under the authority of your Department; for whether the case was or is one within the prize jurisdiction of the admiralty, or whether, on the other hand, the captured property acts control the disposition proper to be made of the vessel, I am of opinion that, inasmuch as there has been no adjudication upon the case by a court of prize, and the property has not passed into the custody of any agent of the Treasury, and has not been appropriated to the public use on due appraisement, as provided in section 2 of the act of March 12, 1863, the President has authority to direct that the property be released by the military persons who have it

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Steamer A. G. Brown.

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in custody, and restored to the claimant, if his ownership is established.

The property has not yet passed into the custody of the law. The President may affirm or disaffirm the capture at any time before the captors have parted with the possession of the property, by placing it in subjection to the jurisdiction of the appropriate legal tribunal. The authority which was exercisable by the President, in respect to the capture, immediately upon its occurrence, may be exercised by him now. Nothing has transpired since it was effected which can be held to change or modify his relation to the subject-matter.

In the case of the *Elsebe*, (5 Rob., 173,) Lord Stowell held that the crown had power to direct the release of property seized as prize before adjudication and against the will of the captors.

While some might suggest doubt whether, in a case of maritime prize, distributable in part to captors, the President can exercise the power which in the *Elsebe* was held to appertain to the crown in England, I suppose no one would doubt that the President might lawfully direct the release, if he saw fit, of prize property in which the captors took no interest, by grant of Congress, or otherwise, while it was in the possession, and subject to the control, of the captors.

If the captors had given disposition to this vessel, according to the statute of 1863, and had turned her over to a Treasury agent appointed under that statute to receive and collect captured and abandoned property, the case would present a different aspect. It has been heretofore held by this office, that captured property duly received by an agent of the Treasury must take the course prescribed by the paramount law of the statute. Such property is not in military custody, and not subject to the control of any military officer. An order directed to the captors cannot affect it, for they have no power over it. It is beyond their jurisdiction. An order to the agent of the Treasury would not be effective, for he is bound to obey

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Steamer A. G. Brown.

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the mandate of the statute, and dispose of the property according to the requirements of the statute. But during the continuance of the military possession of such property, and before the fiscal possession (so to speak) has begun, the President may, by virtue of the attributes of his office, and in the exercise of his discretion, direct the subordinate officer who may have it in custody to terminate the seizure, and restore the property to the owner.

These remarks furnish ground of answer to your first question. My opinion is, that the War Department, acting for the President, and, as it is always presumed to act, with his approbation and by his direction, may lawfully make restitution of this vessel to the owner in the present situation of the property.

The second question is, whether the facts appearing in the papers show a legal right of restitution to the claimant.

I apprehend there is no doubt that the claimant was the owner of the vessel at the time of seizure; but if it is meant to inquire whether the claimant has shown affirmatively, by what is submitted in his behalf, that a court of prize would be bound to restore the vessel to him, or the Court of Claims would certainly on that proof decree restitution to him of the proceeds, I answer the question in the negative. While some persons might believe, from what appears in the papers, that the claimant gave no aid or comfort to the rebellion, yet no one, I apprehend, would venture to assert, that the fact that he never did give aid or comfort to the rebellion is affirmatively established. But in determining whether the property shall be restored by executive authority, neither the President nor the Department is bound to require that the claimant shall make out a case in his favor according to the principles and rules which govern judicial tribunals.

I am, sir, very respectfully,

Your obedient servant,

J. HUBLEY ASHTON.

HON. EDWIN M. STANTON,

*Secretary of War.*

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**Engineers of American Steam-Vessels.**

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**ENGINEERS OF AMERICAN STEAM-VESSELS.**

The proviso of the act of June 28, 1864, was not intended to disqualify persons who are not citizens of the United States from becoming engineers or pilots on American steam-vessels carrying passengers.

ATTORNEY GENERAL'S OFFICE,  
*May 22, 1866.*

SIR: While I have no doubt that persons duly licensed and acting as engineers or pilots of steamers carrying passengers are designable as "officers" of those vessels, I yet do not think that Congress intended, by operation of the proviso to the act of June 28, 1864, (13 Stats., 202,) to disqualify persons who are not citizens of the United States, if otherwise competent, from being or becoming engineers or pilots of such vessels. The only legal view that can be reasonably taken, in my opinion, of that proviso, is, that it was designed simply to embrace those who fulfilled the definition of "officers," and were known as such, on board of the class or description of vessels commonly employed in commerce and navigation at the time of the passage of the acts of March 13, 1813, March 1, 1817, and May 31, 1830, mentioned in the enacting clause of the statute of 1864, and to which those acts were especially applicable, and that the proviso was not intended to establish a qualification in the case of other officers of a different class of American vessels, whose qualifications are specially regulated by the statute of 1852. (10 Stats., 69.) I do not perceive anything on the face of the act of June 28, 1864, nor am I aware of anything in the history of that act which requires, that the application of the proviso should be extended beyond the limitations prescribed by the purview, while, on the other hand, many reasons might be suggested, drawn from the special, well-ascertained facts connected with the engineers and pilots on American steamers navigating the rivers and lakes of the country, which would induce the legal or judicial mind, in giving construction to the proviso, to hold that it was not the

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Engineers of American Steam-Vessels.

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legislative intent, in the absence of clear evidence to the contrary, to affect those classes of officers. It is of course competent for Congress to define a policy on the subject of the nationality of the pilots and engineers of our river, lake, and ocean-steamers, and when the legislature shall do so in clear terms, it will be the duty of executive officers to carry its enactments into effect. But I do not perceive, in the statute of 1864, any well-founded ground for the belief, that it was the design of Congress to depart from the policy established by the declaration in the act of 1852, that any person of good character, exemplary habits of life, and professional knowledge and experience in the duties of an engineer or pilot, might, on being duly licensed as such, exercise the office of engineer or pilot on American steam-vessels carrying passengers. I do not think that Congress can be presumed to have intended that the proviso to an act, like that of June 28, 1864, should be engrafted upon a statute which makes such minute, ample, and wise provision on the subject of the qualifications of engineers and pilots as is contained in the act of 1852, and under which skillful, competent, and able men are now, and have been for years, employed on our American steamers with great advantage to trade and navigation; many of whom would be dispossessed of their only means of livelihood if the qualification of citizenship should now be added to the qualifications prescribed by the statute of 1852.

I express this opinion with the more confidence, as I understand the circuit court of the United States for the eastern district of Michigan has, in a recent case, taken the same view of the statutes. The point distinctly decided by that tribunal, on an application for a mandamus directed to the board of steamboat inspectors, was, that an engineer of a private American steam-vessel is not an "officer" within the meaning of the act of 1864, and that the board of supervising inspectors had no authority in law, therefore, to superadd the qualification of citizenship to the qualifications required for engineers by section 9 of the



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The Soscol Ranch.

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act of August 30, 1852. In the absence of a decision of the Supreme Court of the United States on the same point, I should advise the Department, even if I entertained doubt on the subject, to act upon the view of the statutes judicially adopted and enforced by the circuit court for Michigan.

I am of opinion, therefore, that Robert Bruse, in whose case the present question has arisen, and was decided adversely to his right to a license by the supervising inspector at Chicago, is competent, if otherwise qualified according to the acts of Congress, to be engineer of an American steam-vessel.

I am, sir, very respectfully,  
Your obedient servant,

JAMES SPEED.

Hon. HUGH McCULLOCH,  
*Secretary of the Treasury.*

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THE SOSCOL RANCH.

1. Congress had power to dispose of lands claimed by settlers upon the Soscol Ranch, in California, under the pre-emption laws, at any time before the proof and payment required by those laws were made.
2. Settlement on the public lands of the United States confers of itself no right against the Government. It gives the settler, under the pre-emption laws, a right to enter the lands occupied and improved, when they are open to sale and he has complied with the laws in respect to proof of settlement and payment of the prescribed consideration.
3. Congress had power, as against persons who, before the passage of the act of March 3, 1863, had settled upon the lands in that ranch, but who had not perfected their right of entry, to confer upon claimants, under the Vallejo title, an absolute title to all the land purchased from Vallejo or his assigns.
4. It was the intention of Congress to enable any *bona fide* purchaser from Vallejo, whether resident or not of California, who should prove that he had effected, either personally or through a tenant, settlement of part of the tract embraced by his claim, to acquire title thereto from the United States.

ATTORNEY GENERAL'S OFFICE,  
May 26, 1866.

SIR: According to the view I take of the case of the Soscol ranch, stated in your letter of the 21st instant, it is

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The Soscol Ranch.

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entirely unimportant to determine at what time that tract became open to settlement under the general preëmption laws, since, in my opinion, Congress had full power to dispose of the lands claimed by settlers under the preëmption laws at any time before the proof and payment required by those laws were made. The purpose and effect of the act of March 3, 1863, were to remove from entry, at the land office, by persons claiming to be settlers under the preëmption laws, all the land within the limits of the "Soscol ranch," in California, until the expiration of twelve months after the return of the public surveys authorized by the statute to be extended over the tract of country embraced by that ranch. During that period each purchaser from Vallejo, or his assigns, was authorized to enter, according to the lines of the public survey, at \$1 25 per acre, so much of the land purchased from Vallejo, or those claiming under him, as he had reduced into possession at the date of the adjudication of the Supreme Court, which determined the invalidity of Vallejo title. It was not until the expiration of the time limited for the establishment of the claims of the purchasers from Vallejo that any part of the land in the "Soscol ranch" was liable, after the passage of the act of 1863, to be dealt with as other public land, and then only such lands as remained unclaimed by purchasers from Vallejo, or his assigns, or were embraced by claims of those purchasers which had been rejected by the register and receiver, were thrown open to entry under the general preëmption laws. In this view of the purpose and effect of the statute of 1863, I have no difficulty in saying, in reply to your second inquiry, that a party who, prior to the passage of the act of March 3, 1863, commenced or continued a settlement in person upon a parcel of land within the "Soscol ranch," and so complied with the terms and conditions of the preëmption laws as to be entitled, by virtue thereof, on making the proof and payment thereby required, to enter such parcel and obtain a patent therefor, is precluded from making such entry, and obtaining such patent, if the parcel claimed

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The Soscol Ranch.

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forms a part of a tract which, at the time of the adjudication referred to, had been reduced to possession by a *bona fide* purchaser from Vallejo, or his assigns, who, within the period, and in the mode prescribed by the statute of 1863, made claim to such tract, accompanied by the required proof, showing his *bona fide* purchase, settlement, and reduction into possession of such tract.

It is not to be doubted, that settlement on the public lands of the United States, no matter how long continued, confers no right against the Government. It only gives the settler, under the preëmption laws, a right to enter the land occupied and improved when it is open for sale, and when he has complied with the conditions, as to proof of settlement and improvement, and payment of the consideration prescribed by the statutes. It is compliance with these conditions that alone vests an interest in the land. The land continues subject to the absolute disposing power of Congress until the settler has made the required proof of settlement and improvement, and has paid the requisite purchase-money. Before these steps are taken for the designation and assertion of his claim, Congress may at any time intervene, and either exempt the land from entry, location, or appropriation, or dispose of it by grant to other parties. Before proof and payment are made, the only right which the settler has is an inchoate right of entry. When proof and payment are duly made, his right of entry becomes choate, and he acquires (perhaps even before entry) a vested interest in the land. The question may be a delicate one, whether Congress can impair a vested right of entry; but there is no doubt that before the settler has taken the steps necessary to convert the privilege of preëmption into a vested right of entry, by establishing the fact of his settlement, and paying the purchase-money in the manner prescribed by law, Congress has absolute power to place the land beyond the operation of the statutes under which the settlement was made.

Pending the adjudication of the claim presented by Vallejo to the board of land commissioners, under the act of

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The Soscol Ranch.

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1851, the lands embraced by his claim were not liable to be dealt with as public lands of the United States. The statute of 1851 declares, that "all lands (in California) the claims to which have been finally rejected by the commissioners, or which shall be finally decided to be invalid by the district or Supreme Court, shall be deemed, held, and considered as part of the public domain of the United States." When, therefore, the Supreme Court reversed the decree of the district court, affirming the validity of Vallejo's claim to the "Soscol ranch," the lands embraced thereby became public lands, and liable to be appropriated by Congress, under its general constitutional power over the subject. It is not necessary to determine, whether, immediately on the decision of the Supreme Court, or at any time after the lands in question, by operation of any statute, became subject to preëmption—whether, in other words, there was any law under which persons not claiming under grants from Vallejo, or his assigns, could have acquired by settlement, proof thereof, and payment of purchase-money, a right to enter the lands at the land office, if such right had not been defeated by the statute of 1863. I assume that the lands embraced by the Vallejo claim fell upon the adjudication of the Supreme Court, under the operation of the general preëmption laws, as other public lands, or were subject to the operation of special laws of that denomination, applicable to public lands in California. But, under those laws, settlers could acquire, as I have already stated, no interest which it was not competent for Congress to divest, until they had taken all the steps necessary to perfect their right to make entries of the lands settled and improved. They were required not only to file declaratory statements within a time limited, after the receipt at the district land office of the plats of the township embracing such settlements, but they were required also to establish their claims in the manner prescribed by law, and to pay the nominated consideration for the lands; and it was not until those proceedings at the land office had all been completed and consummated, that any vested right

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or interest could be acquired, which it was incompetent for Congress to disturb or affect by its legislation.

Now, I understand from your statement of the facts of the case under consideration, that although there may have been persons claiming adversely to the Vallejo grantees, who had perfected a right by a continued settlement, to make proof and payment as required by law, and who would have been entitled to enter the lands at the land office, and to obtain patents if such proof and payment had been actually made, yet, at the date of the statute of 1863, such persons had not complied with those conditions, on which their right to make entry depended, and was alone capable of being perfected. On the passage of the act of 1863, the right of such persons to make proof and payment, and, of necessity, therefore, to make entries of the lands claimed by them, was placed in abeyance, and by operation of that statute remained in abeyance, until it was ascertained, in the manner designated by the act, that the lands claimed had not been, at the date of the adjudication of the Supreme Court, reduced into possession by a *bona fide* purchase from Vallejo or his assigns, either through the neglect of any such purchaser to present his claim to the register and receiver within the time limited by the statute, or through the failure of any such purchaser to establish his title to the tract, comprehending the lands claimed under preëmption laws. Congress, by the act of 1863, made new and different disposition of the property. It was passed in recognition of the high equities of the purchasers from Vallejo, whose claim was rejected on technical grounds by the supreme appellate tribunal, and was intended to afford such relief as not only a beneficent, but a just government, was bound to extend to persons in their situation. It declared, without qualification, that every purchaser from Vallejo or his assigns might buy, at the minimum price, as much of the land as he had reduced into possession under his deed of conveyance when the adjudication occurred, and it gave him twelve months, after the return of the survey, within which to prove his

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The Soscol Ranch.

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title under Vallejo, and the extent to which the land claimed was at that date in his possession. If, within the time limited for these proceedings, any such purchaser duly established his title under Vallejo, he was entitled to enter and obtain a patent for all the land which he proved had been reduced into his possession at the date of the decree of the Supreme Court, although a part of such tract was claimed by settlers who may have acquired, before the passage of the statute of 1863, a right to enter the land they claimed on making the proof and payment required by the preëmption laws.

It would seem to be unnecessary, in view of the foregoing considerations, that I should make extended answer to the second question stated in your letter. I have already said that a settler, under the preëmption law, acquires and can acquire no vested interest in the land he occupies by virtue simply of settlement; and that no vested interest is obtained until the settler has taken all the legal steps necessary to perfect an entry in the land office. Before such steps are taken, he has nothing but a contingent personal privilege to become, without competition, the first purchaser of the property, which he may never exercise, or which he may waive or abandon. During the interval between the institution of the settlement and the establishment of the claim by proof and payment of the consideration nominated in the law, Congress has power to dispose of the land at its pleasure. It may recall the privilege previously conferred, or invest any one else with the same privilege, or it may make an absolute grant of the land to other parties with or without consideration. There is no constitutional objection to the exercise by Congress of any power over the land after settlement made, but before right of entry has been perfected, that it was competent to exercise before the land was thrown open to preëmption. Entertaining these opinions, I cannot doubt that Congress might, as against persons who, before the passage of the act of 1863, had actually settled upon the land in question, but who had perfected their right of entry in the manner

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indicated, confer upon claimants under Vallejo an absolute title to all the land which they might prove was purchased from him or his assigns, and was reduced to possession at the date of the decision of the court. This power, I am of opinion also, Congress exercised by enacting the statute of 1863. It appearing, therefore, that a claimant under Vallejo was in possession, at the date of the decision, of any part of the land called for by his deed or purchase, his right to enter the tract so possessed, and obtain a patent therefor, is rendered absolute by the statute of 1863, and no supposed equity, based upon simple settlement, set up by a claimant under the preëmption laws, can prevail against that right, or should be allowed to interfere with the full consummation of it, according to the intent of Congress.

The last point for my consideration is, whether a *bona fide* purchaser of a tract of this land from Vallejo, or his assigns, is bound, in order to bring himself within the act of 1863, to prove an actual personal settlement on such tract at the date of the adjudication of the case; or whether a settlement at that date on such tract by another person, the tenant of such purchaser, is sufficient, although such purchaser be a non-resident of California?

The Supreme Court, in *Hickey et al. vs. Starke et al.*, (1 Peters, 98,) in giving interpretation to the words "actual settlers," in the cession act of Georgia, held that a settlement made on the land claimed by another person, who cultivated it for the proprietor, was sufficient to satisfy the requisition of the act, though the proprietor neither resided in person on the estate, or, indeed, within the territory. Even if there were doubt, upon principle, as to the legal import of the term "settlement," as used in the statute of 1863, I should not hesitate, in view of this high judicial authority on the point, to determine that personal settlement, at the date of the adjudication mentioned, is in no case necessary to be proved by a claimant, under the statute, in order to satisfy its requirement. The better opinion, I think, is, that the two forms of expressions employed in

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the statute to indicate the particular relation to, or connection with, the land, on the part of the claimant, necessary to be established by proof, are, considering their contexts, really convertible, and that the ideas involved in them are not distinguishable. The cardinal idea of the statute was the one conveyed by the expression "reduced to possession;" the only one employed in section 2 which contains the words of grant on which the rights of the claimants depend. The maxim *qui facit per alium facit per se*, whether of universal application, in cases of claims under the general preëmption laws or not, (and I am inclined to agree with Mr. Attorney General Butler in the opinion that it is not,) expresses, in my opinion, the legal rule for the determination of claims under the special act of 1863. It was not the equity possessed by the claimants under Vallejo, derived from settlement, occupation, or cultivation alone of the lands they had purchased, which induced Congress to give the relief provided by that act. The act was passed in recognition of the view so ably and powerfully enforced by Mr. Justice Grier, in his opinion dissenting from the judgment of the court, that the grant to Vallejo was a genuine grant for a consideration paid, and so universally acknowledged in the country of its origin, which the Mexican Government would never have disturbed on any of the grounds on which its invalidity was affirmed by the majority of the judges of the Supreme Court. That was the superior equity possessed by all *bona fide* purchasers from Vallejo, or his assigns, which Congress deemed eminently worthy of protection. If the grant set up by Vallejo had been rejected as fabricated or spurious, there is no reason to believe that Congress would have extended protection to any who deduced title through such a grant, however strongly their claims as mere settlers or occupants of the land might have been commended to their consideration. Congress did not require the claimants to prove any connection with the lands which they had purchased earlier than the date of the adjudication of the case. It was not thought that parties whose relations to the prop-



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Le Baron's Case.

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erty were of earlier inception had superior rights to those possessed by persons who, at that date, had reduced the lands they claimed into their possession; nor were the equities of the latter deemed in any sense inferior to the equities of the former. The beneficent provisions of the statute were grounded upon a consideration higher and deeper than the settlement of the lands by the Vallejo claimants. They were suggested and framed in the belief that those claimants possessed an equity as purchasers of a genuine, though defective title, derived from Mexico, to which this Government, in good faith, was bound liberally to extend protection.

I hold, therefore, that, in view of the general policy of the statute, it is the duty of the Department charged with its execution to give such construction and effect to its provisions as is most consonant with its reason, and will best promote its objects.

I think it was plainly the intention of Congress to enable any *bona fide* purchaser from Vallejo, or his assigns, whether resident or not of California, who should prove, within the time limited, that he had effected, either personally or through a tenant, settlement of a part of the tract embraced by his claim, to acquire title thereto from the United States.

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

Hon. JAMES HARLAN,

*Secretary of the Interior.*

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LE BARON'S CASE.

A mail contractor cannot draw pay for services or work rendered or done prior to his taking the oath prescribed by the act of March 3, 1863.

ATTORNEY GENERAL'S OFFICE,

June 5, 1866.

SIR: In your letter of the 21st of May, you inform me that C. L. Le Baron has conveyed the mail on route No.

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Le Baron's Case.

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6,584, from Pensacola, Florida, to Pollard, Alabama, for the quarter ending March 31, 1866. Le Baron did not take the oath prescribed by the act of March 3, 1863, till the 4th of May, 1866. Such being the facts, you desire to know whether, in my opinion, he can be paid for conveying the mail before he took the oath.

The question may be best answered by dividing it thus:

1st. Are contractors for carrying the mails required to take the oath prescribed in the act of the 3d of March, 1863?

2d. If contractors are required to take the oath, is it necessary that they should take it before discharging the duties, or performing the service, in order to entitle them to their pay?

As to the first—

Looking through the legislation of Congress from 1792, particularly to the acts of 1792, 1810, and 1825; considering the opinion of Chief Justice Marshall, in the case of the *United States vs. Solomon Belew*, (2 Brockenbrough's Reps., 280;) and being informed of the fact that the Post Office Department has constantly, since the organization of the Department, required mail-contractors, and mail-carriers to take the oaths prescribed in the acts of 1810 and 1825; and seeing that mail-contractors and mail-carriers are as certainly embraced by the terms of the oath prescribed in the act of 1863 as they were in the oath prescribed in the preceding acts, I cannot doubt but that mail-contractors should be required to take the oath.

As to the second question—

The act of March 3, 1863, section 2, requires that the Postmaster General, all postmasters, and special agents, and all persons employed in the General Post Office, or in the care, custody, and conveyance of the mail, hereafter appointed and employed, shall, previously to entering upon the duties assigned to them, or the execution of their trusts, and before they shall be entitled to receive any emoluments therefor, take the prescribed oath, and cause a certificate thereof to be filed in the General Post Office. It will be

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*Le Baron's Case.*

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perceived that it is made as much the duty of mail-contractors to take the oath, as for the Postmaster General, or any other officers of the Department, to do so. There is no difference, in this respect, under the act, betwixt officers and employés and contractors. In one aspect of the case, and probably its chief aspect, the ability to take the oath, and the fact that the oath is taken, are qualifications as well for employés and contractors as for officers in the Post Office Department. It will hardly be contended that the regular officers of the Department could draw their salaries without taking the oath; and, as the act makes no distinction betwixt officers and contractors, I do not see why the oath is not also a condition precedent in the case of contractors.

The duties of an office may be performed by one who is not qualified, and who cannot therefore receive the emoluments thereof. So a contractor may render services for which he is not qualified, and for which he cannot therefore get his reward. Cases of individual hardship may occur under the statute, because parties are not diligent in learning what are the requirements of the law. The cause of such hardship cannot be said to be in the law, but in the party.

I am of opinion, that a contractor for carrying the mail cannot draw pay from the Department for services rendered, or work done, prior to his taking the oath; and, therefore, that you are not warranted by the law in paying Le Baron for services rendered prior to his taking the oath.

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

Hon. WILLIAM DENNISON,  
*Postmaster General.*

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Clearance of Steamer Pocahontas.

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CLEARANCE OF STEAMER POCAHONTAS.

This vessel is entitled to clear with munitions of war for Honolulu.

ATTORNEY GENERAL'S OFFICE,

June 8, 1866.

SIR: I have the honor to acknowledge the receipt of your letter of the 7th instant, covering a copy of a communication from William Jones, master of the steamer "Pocahontas," to you. This vessel, it is said, was late a gun-boat in the United States navy, and is now the private property of Henry F. Hamill, of New York city. The letter of Mr. Jones asks permission to load this vessel with munitions of war for Honolulu, Sandwich Islands. He declares that there is no intention of selling the ship or cargo to any republics now at war with Spain.

I am aware of no law prohibiting the shipment, on board of private vessels in our ports, of munitions of war, destined for Honolulu; nor do I know of any law under which a clearance, in the case of such a vessel as is described by Mr. Jones, bound on such a voyage as is mentioned in his letter, would be refusable. If, therefore, when the vessel is ready to clear, no case different from that stated in the communication of that gentleman is presented, I should think there would be no objection to granting the vessel and cargo the proper papers.

You are, of course, aware that, should the vessel be cleared for Honolulu, the presentation of the present application will not entitle Mr. Jones, or the owners of the vessel and cargo, at any stage or period of the voyage, to any other protection from the Government of the United States than is extended in all cases to citizens of the United States engaged in lawful commerce on the high seas. The Government will not be precluded by anything which has occurred from inquiring hereafter into the intentions or conduct of the parties.

I think that, if nothing to the contrary of Mr. Jones's

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Bonds of School-Fund of Louisiana.

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statement should subsequently appear, the vessel would be entitled, at the proper time, to clear for the proposed voyage, under the laws of the United States.

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

Hon. HUGH McCULLOCH,

*Secretary of the Treasury.*

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**BONDS OF THE SCHOOL-FUND OF LOUISIANA.**

These bonds should be restored to the State authorities.

ATTORNEY GENERAL'S OFFICE,

June 16, 1866.

SIR: I have the honor to acknowledge the receipt of your letter of yesterday, submitting to me the question, whether certain bonds claimed to belong to the school and other trust-funds of the State of Louisiana, which were taken by General Sheridan, at Shreveport, Louisiana, and transmitted to Washington, together with the bonds belonging to the free banks of the city of New Orleans, should be returned to the State authorities of Louisiana, in the same manner that the bonds belonging to the banks have been returned, in accordance with my letter to you of April 17th.

In reply I have to advise you, that it is my opinion that all bonds identified as belonging to such trust-funds should be returned to the State authorities of Louisiana.

In relation to the bonds still remaining in the Treasury Department, alluded to in your letter as unclaimed, it is my opinion that they should be retained for the present in the custody of the Department, in order to afford time and opportunity for claimants thereto to appear.

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

Hon. HUGH McCULLOCH,

*Secretary of the Treasury.*

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Claim of Rosencrantz and Merchant.

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## CLAIM OF ROSENCRANTZ AND MERCHANT.

The seizure of the cotton, claimed by Rosencrantz and Merchant, on May 13, 1865, under the order of General Canby, constituted a valid capture, upon which the Court of Claims can alone adjudicate, under the act of March 12, 1863, according to the principle of the case of the Savannah Cotton.

ATTORNEY GENERAL'S OFFICE,

*June 16, 1866.*

SIR: Messrs. Rosencrantz and Merchant claim the proceeds of the sale of certain cotton taken at Mobile, by the quartermaster in charge of captured property there, and sold at New York by the United States cotton agent.

It appears that, a short time before the occupation of Mobile by our troops, the cotton was placed on board of two steamers, chartered by its owners and conveyed up the river. The claimants allege that it was thus removed from Mobile in order to prevent its destruction by the "confederate authorities." An affidavit attached to the invoice of the two hundred and forty-one bales claimed by Rosencrantz states, that it was thus shipped up the river "under a permit granted by the confederate authorities to Captain L. Merchant." That is, as I understand it, nearly one thousand bales of cotton were permitted by the "confederate authorities" to leave the city of Mobile, then in danger of capture by our troops, in order that the property might be saved from destruction by the same "confederate authorities." There must have been danger of destruction from some quarter, otherwise the claimants would not have removed their property from the city. If they were fearful of the action of the rebels, there must have been an intimation of an intention in that quarter to destroy the cotton. But if the rebels intended to burn or otherwise destroy the property, how came it that they gave the claimants a "permit" to carry it beyond their control? The more probable explanation would seem to be that the chief and controlling purpose of the removal was to place the cotton where the United States could not reach it, at

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Claim of Rosencrantz and Merchant.

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least until the claimants could make favorable terms with the military authorities. Their subsequent action seems to confirm this view. After the establishment of General Granger's lines around Mobile, it was found that the two steamers with their cargoes were not within them. The claimants visited General Granger and procured from him a paper denominated a "safe-conduct," but which, on its face is an order from that officer addressed to the charterers of the steamers, directing them to bring "to the city the boats Coquette and Flirt with their cargoes without delay." The paper proceeds, "protection for the same is hereby granted by the United States military authorities." The order was obeyed. The cotton reached Mobile, but at what date does not appear, and was permitted, as is stated, to remain in the possession of the claimants until its seizure by General Canby's quartermaster. The order or "safe-conduct" of General Granger is dated April 13, 1865. General Canby, on or about the 21st of April, established his headquarters at Mobile. On that day he issued an order, which is interpretable as a warrant for the seizure of all cotton within the lines of our military occupation as then established. Pursuant to this order, and in ignorance, as may be assumed, of the previous order of General Granger relative to the property, the cotton of the claimants was taken out of their possession on the 13th of May, at Mobile, by the quartermaster in charge of captured property, and shipped to New York.

The seizure thus effected constituted an actual capture of the cotton. But, it may be contended, General Canby's officer cannot be presumed to have intended to effect a capture of property which was at the time of seizure under the protection of a safe-conduct duly granted by General Granger, and therefore the case wants that element of intention to seize and retain the property as captured which always exists in a case of actual valid capture. Even if there were no question as to the competency of General Granger to protect cotton within the limits of his command from military capture, I should desire, before giving my

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Claim of Rosenerantz and Merchant.

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assent to the view of the case just stated, to know much more concerning the facts attending the conduct of the claimants after the issuance of the "safe-conduct," than is contained in the papers you have submitted. Did they take advantage of it within a reasonable time, and under circumstances exhibiting perfect good faith on their part? Did they avail themselves of the privilege and protection, which they claim were extended to them by General Granger, before or after the stringent order of General Canby was promulgated, and if not till after that event, why did they delay the removal of the cotton to Mobile? These questions are not answered. Upon the answer given to them would depend to a great degree the determination of the precise legal effect of the safe-conduct granted by General Granger, and the validity of the claim made under it. But independently of the question whether the claimants have placed themselves in a position to set up this protection against the present capture, there is grave doubt as to the authority of General Granger to exempt this property from liability to capture. This doubt is suggested by the provisions of the 6th section of the captured and abandoned property act of March 12, 1863, which made it a high offence for any military officer to refuse or neglect to turn over to an agent of the Treasury Department any cotton, sugar, rice, or tobacco which came under his control in the insurrectionary districts. Without determining whether the cotton of the claimants was, in fact and law, under the control of General Granger, before it was brought back to Mobile, I cannot, as at present advised, hold that he had power, the act of 1863 being in full force and operation, at one and the same time, to permit it to come within his lines, and thus under his direct control, and grant in its favor a right of exemption from capture for the purposes designated in the statute.

Cotton seems to be specially stigmatized by the statute as a capturable thing, whenever found by military persons in the insurgent territory. Placed under the ban of the military power of the Government, no such privileges and



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**Marshals' Expenditures for Furniture and Rent.**

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exemptions as may be extended to ordinary property on land in time of war could be extended to it, without incurring heavy penalties, by any one holding a commission or wearing a uniform in the military service of the United States. We have no concern with the policy of this law. Congress has sole authority to make rules concerning captures on land or water. Every such rule must be obeyed by military officers. They have no authority to make exceptions to or grant exemptions from its operation. A grant of such an exception is null and void, and can furnish no protection to any person or property. In this view of the purpose and effect of the statute of March 12, 1863, I am constrained to hold that General Granger possessed no authority to grant such protection to this cotton as would in law exempt it from the operation of the subsequent order of General Canby, and from liability to capture in pursuance of that order, and therefore that the seizure on the 13th of May constitutes a valid capture of the property, upon which the Court of Claims is alone competent to adjudicate.

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

Hon. HUGH McCULLOCH,

*Secretary of the Treasury.*

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**MARSHALS' EXPENDITURES FOR FURNITURE AND RENT.**

A marshal who may incur a greater expense than \$20 a year for furniture, without the previous authority of the Secretary of the Interior, cannot be allowed in his accounts the amount expended exceeding that allowance; and the same rule applies to the excess above \$50 for rent and improvements, when expended without such authority.

ATTORNEY GENERAL'S OFFICE,

June 25, 1866.

SIR: The plain import of the provisions of the enacting clause and proviso of the 2d section of the act of February

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Marshals' Expenditure for Furniture and Rent.

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26, 1853, (10 Stats. at Large, 165,) is, that a marshal who may incur a greater expense than \$20 in any one year for furniture, or \$50 for rent and improvements, without receiving the previous authority of the Secretary of the Interior, shall not be paid or allowed the amounts thus expended.

The enacting clause provides that the marshal shall be paid expenses necessarily incurred for fuel, lights, and other contingencies that may accrue in holding the courts within the district. If this were the whole of the law on the subject, the only question, in the case of such expenditures as you mention, would be whether they were necessarily incurred? But the proviso says that a marshal shall not incur an expense of more than \$20 in any one year for furniture, or \$50 for rent of a building and improvements thereon, without receiving the instruction of the Secretary of the Interior. Nothing can be clearer, it seems to me, than that Congress meant to prohibit the payment of expenses incurred by the marshal, for furniture and rent, exceeding the amount limited in the statute, without compliance with the terms of the proviso.

This question was carefully considered by Mr. Attorney General Black, and, in the opinion which he expressed, I fully concur. Mr. Black has exhausted the argument for this construction of the statute. I forbear to repeat what he has said so well.

I am, sir, very respectfully,  
Your obedient servant,

JAMES SPEED.

HON JAMES HARLAN,  
*Secretary of the Interior*

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Judicial Powers of U. S. Consuls in Sandwich Islands.

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## JUDICIAL POWERS OF UNITED STATES CONSULS IN SANDWICH ISLANDS.

The consular courts of the United States at Honolulu have the right and power, without interference from the local courts, to determine, as between citizens of the United States, who comprise the crew of an American vessel, and are bound to fulfill the obligations imposed by the shipping articles.

ATTORNEY GENERAL'S OFFICE,

*June 26, 1866.*

SIR: I have the honor to acknowledge the receipt of your letter of the 4th of May, together with the despatches of Alfred Caldwell, Esq., consul for the United States at Honolulu.

The consul complains that the Hawaiian courts have been guilty of breaches of the treaty betwixt the United States and his majesty the King of the Hawaiian Islands.

The first case is this—

Four seamen were lawfully shipped at New Bedford, in the United States, on the American ship "Josephine," for a whaling voyage not exceeding four years in duration, and back again to New Bedford. One of the judges of the supreme court of the kingdom discharged the seamen from the ship, and relieved them from the obligation of their contract, assuming jurisdiction because the seamen were subjects of the kingdom. The four seamen had made no application to the consul for an exercise of this jurisdiction and power.

The second case is—

The American ship "Blue Jacket" went to the port of Honolulu, for the purpose of taking from there a cargo of oil to New Bedford. A seaman on the boat by the name of Thomas Duane, but calling himself Burns, applied to the consul to be discharged from the vessel, because he had not been lawfully shipped. The consul notified the captain of the "Blue Jacket," had the witnesses before him, heard the case regularly, and dismissed the complaint

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Judicial Powers of U. S. Consuls in Sandwich Islands.

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on the ground that Duane or Burns had been lawfully shipped on said vessel at San Francisco on the voyage to New Bedford.

One of the judges of the supreme court of the kingdom, notwithstanding he was informed of the proceedings and judgment of the consulate court, assumed jurisdiction, and discharged the seaman. After the seaman was discharged, he sued the captain in a territorial court, upon a claim of \$3,000.

The despatch does not state whether Burns (or Duane) was or was not a citizen of the United States.

By the 10th article of the treaty betwixt the United States and the Hawaiian kingdom, it is agreed that "each of the two contracting parties may have, in the ports of the other, consuls and commercial agents, of their own appointment, who shall enjoy the same privileges and powers with those of the most favored nations. \* \* \*

The said consuls, vice consuls, and commercial agents are authorized to require the assistance of the local authorities for the search, arrest, detention, and imprisonment of deserters from the ships of war and merchant vessels of their country. For this purpose, they shall apply to the competent tribunals, judges, and officers, and shall in writing demand the said deserters, proving, by the exhibition of the registers of the vessels, or the rolls of the crews, or other official documents, that such individuals formed part of the crews; and this reclamation being thus substantiated, the surrender shall not be refused."

This treaty was concluded and signed at Washington, on the 20th day of December, 1849.

It is unnecessary to discuss the question, whether this treaty conferred any judicial power upon the consuls of the United States in the Hawaiian kingdom, because it is agreed that the consuls of the two contracting parties shall enjoy the same privileges and powers with those of the most favored nations; and if, therefore, by treaty with any other nation, either of the parties should confer judicial power upon consuls, then, by the intention and express

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Judicial Powers of U. S. Consuls in Sandwich Islands.

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words of the treaty betwixt the United States and the Hawaiian kingdom, the consuls mentioned therein were to have like power. Such power was conferred by the twenty-first article of the treaty entered into betwixt the Emperor of France and the King of the Sandwich Islands. In that treaty it is stipulated, that the "respective consuls shall be exclusively charged with the internal order on board of the merchant vessels of their nations, and shall alone take cognizance of all the crimes, misdemeanors, and other matters of difference in relation to said internal order, which may supervene between the master, the officers, and the crew, provided the contending parties be exclusively French or Hawaiian subjects, and the local authorities shall not be allowed therein to interfere, unless by the approval or consent of the consuls, or in cases where the public peace and tranquillity are disturbed or endangered."

From this article of the treaty betwixt France and the Sandwich Islands, the judicial power of the consul of the United States at Honolulu is derived and limited. It is not known that the Hawaiian kingdom has any treaty with any other government granting larger powers to consuls. In respect to consular powers, France has been the most favored nation.

What, then, are the powers granted by this treaty?

1st. To give the consul jurisdiction, if a French vessel be in a Hawaiian port, the parties must all be French subjects; and if a Hawaiian vessel be in a French port, the parties must all be Hawaiian. This article having become a part of the treaty between the United States and the Sandwich Islands, it conferred judicial power on the consuls of the United States only where the contending parties are exclusively citizens of the United States. If it should be shown that either party was not a citizen of the United States, the local courts, and not the consul, would alone have jurisdiction.

2d. Where the parties to the controversy are all citizens of the United States, and the controversy has relation to the

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**Judicial Powers of U. S. Consuls in Sandwich Islands.**

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internal order of a vessel of the United States in a Hawaiian port, the local authorities cannot interfere therein, except by the approval or consent of the consul, or in cases where the public peace and tranquility are disturbed or endangered.

And that brings us to consider whether the validity or invalidity of the enlistment on the vessel is a matter relating to the internal order of the vessel.

In the treaty betwixt the United States and the Sandwich Islands, it is directly agreed, that, upon an exhibition of the registers of the vessel, or the rolls of the crews, or by other official documents, showing that a seaman belongs to the vessel, the Hawaiian authorities shall surrender the seaman as a deserter. So far as desertion is concerned, the plain language of the treaty precludes the Hawaiian court from going behind the evidences mentioned in the treaty. If a vessel of the United States shall enter a Hawaiian port, and a seaman desert, whose name is regularly borne on the ship's papers, he must be surrendered at the instance of the consul. The court, then, cannot inquire whether his shipment is regular or irregular. This feature of the treaty rests upon the idea that the vessels of the United States going into the Sandwich Islands have lawfully-enlisted crews, and that, if there is to be any controversy about the validity of the contract of shipment, the parties are remitted to the courts of the United States.

Now, when the consuls of the United States were invested with judicial power, under the treaty betwixt France and the Sandwich Islands, the treaty betwixt the United States and the Sandwich Islands was not affected thereby in any particular. The judicial authorities of the Islands, and the consuls of the United States, were still bound to regard all persons on vessels of the United States, and whose names appeared on the boat's papers as parts of the crew. But in the treaty betwixt the United States and the Sandwich Islands, the papers are only made conclusive in cases of desertion. It is not certain but that, under that treaty, a seaman could in any other case but desertion ap-

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**Judicial Powers of U. S. Consuls in Sandwich Islands.**

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peal to the courts of the Island to be released from his contract. Upon that question I have no opinion. The provisions of that treaty are referred to simply to show that, in cases of desertion, the courts of the Island are required to surrender deserters from vessels of the United States, and that, in such cases, they cannot look behind the papers of the boat.

In making this agreement in regard to deserters, the two Governments announced the principle, that the question whether the shipment of the seaman was lawful or not, is one which should be remitted to the authorities of the country to which the vessel belongs.

In the treaty with France, consuls are made judicial officers, and given cognizance of all the crimes, misdemeanors, and other matters of difference, in relation to the internal order of the vessel, which may supervene between the master, the officers, and the crew. The question whether a seaman is bound to fulfill the obligation imposed by the shipping-articles is certainly a matter of difference betwixt the master and one of the crew. The fact must be first determined that he is of the crew before the consul can take jurisdiction. Until the fact is made manifest that he is of the crew, no rules in regard to the internal order of the vessel can be enforced. Upon the question whether he is not of the crew, depends all the power and authority of the consul.

To say that the consul can decide all questions concerning the internal order of the vessel, except the question whether the man is or not of the crew, is, in effect, destroying his jurisdiction, making it of no value, by depriving him of the power to dermine conclusively the very question upon which all order in the vessel can be supported. Unless consuls have the power to decide, and to decide without interference from the local courts, who compose the crew, it seems to me that all their judicial powers are idle. It is a question concerning the internal order of the vessel; because upon it depends all right to impose and enforce rules for the government of the crew, and each member of

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Judicial Powers of U. S. Consuls in Sandwich Islands.

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the crew. If such is not the case, the consuls could not rightfully take cognizance of any case until the local courts had passed upon the validity of the shipping-articles, and any and every seaman could arrest the proceedings of the consuls, by pleading that he had signed when he was drunk, or had been coerced by force, or induced by fraud to do so.

Considering, then, the treaty betwixt the United States and the Hawaiian kingdom, and the treaty betwixt the Emperor of France and the same kingdom, I am of the opinion, that the consular courts of the United States at Honolulu have the right and power, and without interference from the local courts, to determine, as between citizens of the United States, who compose the crew of an American ship.

From what I have said, it necessarily follows that, in the case of the four seamen on the "Josephine," they being subjects of the Hawaiian kingdom, and not deserters, the local courts had jurisdiction; and that, in the case of the "Blue Jacket," as it must be presumed that Burns, (or Duane,) being on an American vessel, was a citizen of the United States, the local court had not jurisdiction. Upon its appearing to the local court that it was a difference betwixt seamen, all American citizens, and that concerned the internal order of a merchant vessel of the United States, the parties should have been referred to the American consul. This seaman had applied to the consul for redress. His case had been heard, and his complaint dismissed. That fact seems to have been known to the local court, which discharged him. It seems to me to have been an unlawful proceeding, and a violation of the treaty.

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

Hon. WM. H. SEWARD,

*Secretary of State.*



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Exportation of Guano.

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## EXPORTATION OF GUANO.

The 8th section of the act of March 3, 1865, repeals that part of the act of August 18, 1856, which requires the trade in guano from guano islands to be carried on in coasting-vessels; and for two years from and after July 14, 1865, all persons, who have complied with the act of 1856, section 2, may export guano in any vessels which may lawfully export merchandize from the United States.

ATTORNEY GENERAL'S OFFICE,

June 27, 1866.

SIR: I have the honor to acknowledge the receipt of your letter of the 5th of June, wherein you ask me whether British ships can take guano from Baker's island to Europe.

The act of Congress of the 18th of August, 1856, (11 Stats., 119,) provides, that islands, rocks, or keys, upon which there are deposits of guano, and which shall have been possessed by citizens of the United States, and proclamation made thereof, as required by the act, shall be considered as *appertaining* to the United States. The guano taken from such islands, rocks, and keys shall be for the use of the citizens, or of persons resident therein, and the introduction of guano from them shall be regulated as in the coasting-trade between different parts of the United States. By this act, the Government secures to the discoverer (a citizen of the United States) of guano upon an unoccupied island, rock, or key, the exclusive use thereof, but upon the condition that the guano is for the use of citizens or residents of the United States, and that the guano is to be brought away in vessels having coasting-licenses, and under the laws regulating the coasting-trade. Under the act of 1856, guano could not be taken from one of these islands, rocks, or keys to any foreign country; or, as the act declares, that, for the purposes of the trade, they shall appertain to the United States, it may be properly said that the act prohibits the export of guano.

By the act of Congress of the 3d of March, 1865, section 8, (13 Stats., 494,) so much of the act of 1856 as prohibits

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Exportation of Guano.

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the export of guano is suspended in relation to all persons who have complied with the provisions of section 2 of the act of 1856, for two years from and after July 14, 1865. This act must mean, that for two years from and after the 14th July, 1865, guano may be exported by all persons who have complied with the provisions of the 2d section of the act of 1856. But guano cannot be exported in coasting-vessels, and there is no express repeal of that part of the act of 1856 which requires the trade in guano from islands, rocks, and keys, to be done in coasting-vessels, and under the law regulating the coasting-trade. Laws and parts of laws may be repealed by implication. This is, I think, a clear case of repeal by implication. The suspension of the prohibition is of no avail, if none but coasting-vessels can take guano from the islands, rocks, and keys; and the act of 1865 is made a dead letter. The object of the act of 1865 was to give the right to persons described in it to export guano, and of course repeals, if not directly, certainly by implication, all acts and parts of acts that prevent the exercise of that right.

I am, therefore, of the opinion that all persons who shall have complied with the 2d section of the act of 1856 may, for two years from and after July 14, 1865, export guano in any vessels that other merchandize can be exported in from the United States.

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

Hon. WM. H. SEWARD,

*Secretary of State.*

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Goods Abandoned in Bonded Warehouse.

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## GOODS ABANDONED IN BONDED WAREHOUSE.

1. The 21st section of the act of July 14, 1862, repeals so much of the preceding laws as entitled the owners of goods remaining in bonded warehouses beyond three years from the date of their importation to claim the surplus of the proceeds of sale of such goods.
2. The Secretary of the Treasury has no power to act upon such proceeds, as in case of a fine, penalty, or forfeiture incurred under the act of July 14, 1862.

ATTORNEY GENERAL'S OFFICE,

*June 27, 1866.*

SIR: Your letter of the 21st instant submits for my consideration and opinion two questions, touching the construction of the 21st and 23d sections of the act of July 14, 1862, "increasing temporarily the duties on imports, and for other purposes," in connection with certain provisions of former statutes regulating the warehousing system of the United States.

By the first "warehousing act" of August 6, 1846, (9 Stats. at Large, 53,) the collector was authorized to sell any goods remaining in public store beyond one year, and to pay the proceeds of such sale, deducting charges and duties, if they remained unclaimed for a period of ten days, into the Treasury of the United States. But the act provided that the owner of the property, on due proof of interest, should, nevertheless, be entitled to receive from the Treasury the overplus of the proceeds of such sale. The act of March 28, 1854, extended the time for the continuance of imported goods in warehouse to three years from the date of original importation. Then came the act of July 14, 1862, which, in section 21, provides that "any goods remaining in public stores or bonded warehouse beyond three years shall be regarded as abandoned to the Government, and shall be sold, under such regulations as the Secretary of the Treasury may prescribe, and the proceeds paid into the Treasury." (12 Stats. at Large, 560.)

On December 10, 1862, three hundred and seventy-six bales of gunny cloth were imported into Boston from Cal-

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Goods Abandoned in Bonded Warehouse.

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cutta, and were duly entered in bond, and placed in bonded warehouse. The cloth remained in the warehouse, without exportation, more than three years. The first question is, whether, after sale of the property, and payment of the surplus of the proceeds, deducting charges and duties, into the Treasury, the owner will be entitled to receive such surplus? I answer, no. The importation in question was made after the passage of the act of 1862. The provisions of the 21st section of that statute, therefore, govern the case. The act of 1862 repeals so much of the preceding laws as entitled the owners of goods remaining in public stores, or bonded warehouse beyond three years from the date of their importation, to claim and receive from the Treasury the surplus of the proceeds realized by sale of such goods. This repeal was effected by a statutory declaration that the goods should be regarded as "abandoned to the Government." I understand by this that Congress meant that the property should be held and treated as left or deserted by the owner, without hope or intention of returning and resuming possession of it. This character or quality, so to speak, is affixed to the goods, by operation of the statute, immediately upon the expiration of the time limited for their exportation; and it continues so affixed to them until the same authority that imposed it shall relieve the property from the predicament. The officers of the executive department of the Government can only lawfully treat property, within the provisions of the statute, as property, *de facto* and *de jure*, abandoned to the United States. They can exercise no jurisdiction to relieve it from that condition, nor can they recognize anybody as entitled to claim it against the Government. It must be entirely clear to every mind that, if the Secretary of the Treasury, or any other executive officer, should pay over the proceeds of property, to which the statute has affixed this quality, he would annul the law. The statute does not declare the property abandoned so long as it, or its proceeds, shall remain unclaimed, but that it shall be then and forever regarded as "abandoned to the Government." The very

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Goods Abandoned in Bonded Warehouse.

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object of the provision was to destroy totally the right conferred on the owner by previous laws to claim and receive the proceeds. In contemplation of the statute, the property ceased to have any owner, when the three years expired, save the United States. No right in any person can be recognized, without treating the property as *not* abandoned, without violating, therefore, the statute; and this, of course, you cannot do. I regard the provision of the 21st section of the act of 1862 as repugnant to, and therefore as impliedly repealing, that provision of the act of 1846 which entitled the owner of goods in public stores, or bonded warehouse, to receive the proceeds of their sale from the Treasury of the United States. The proceeds of the sale of the gunny cloth in question cannot, in this view of the law, be disposed of according to the provisions of the act of 1846.

The second question on which you desire my opinion is, whether the Secretary of the Treasury, by virtue of his authority to remit all fines, penalties, and forfeitures imposed by, or incurred under, the act of July 14, 1862, may exercise jurisdiction to remit the so-called forfeiture of this property? This question I also answer in the negative. The act of 1862 does not treat or describe property in the predicament of the cloth to which reference has been made as forfeited to the United States. It declares merely that it shall be regarded as "abandoned to the Government." This is quite another thing in fact and law. The forfeiture of property is imposed as a penalty for the commission of an act prohibited by law, or for the omission of an act commanded or required to be done by law. The owner of this property has been guilty of no offence of commission or omission. He violated no law in allowing the cloth to remain more than three years in warehouse. He placed his property in a certain predicament; but, in so doing, he is not chargeable with any breach of duty or obligation imposed by statute. All forfeitures cognizable by the Secretary of the Treasury, under the act of 1799, are such as proceed from breaches of statutory duty or obliga-

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Taylor's Claim.

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tion. The act contemplates, moreover, such forfeitures as of judicial cognizance, by providing that the Secretary of the Treasury shall in all cases act upon reports of the facts transmitted to him by the judges of the respective districts in which the forfeitures shall have accrued. I am clearly of opinion, therefore, that this case is not one of which you have jurisdiction under act of March 3, 1799.

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

Hon. HUGH McCULLOCH,

*Secretary of the Treasury.*

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TAYLOR'S CLAIM.

The prize certificates issued to Samuel Harding, Jr., as acting ensign, cannot be paid in the hands of Walter Taylor.

ATTORNEY GENERAL'S OFFICE,

July 5, 1866.

SIR: I have received the letter of the Second Comptroller, containing replies to the several inquiries propounded in my letter of June 5th, relative to the claim for the payment of certain prize-certificates issued to Samuel Harding, Jr. I am now prepared to give you my opinion on the questions arising under that claim.

On the 17th of November, 1864, William Martin Harding, as attorney of Samuel Harding, Jr., received from the Treasury Department two certificates for the shares of prize-money ascertained to belong to Samuel Harding, Jr., on account of the capture of the prize-vessels "Greyhound" and "Minnie," by the steamer "Connecticut," on which Mr. Harding served as an acting ensign. These certificates are on their face declared payable to Samuel Harding, Jr., or order, by the navy agent at New York. They are in the possession of Walter Taylor, who demands payment of them. This demand, if sustainable at all, must be sustained on one or other of two grounds. The first is, that

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Taylor's Claim.

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Taylor is the lawful assignee and owner of the certificates and the claims they represent. The other is, that if he is not such assignee and owner, he has been duly authorized by the payee to receive, as his agent or attorney, the amount of them from the Government. The certificates are not endorsed by the payee, or any authorized agent. The title has not passed therefore to Taylor by endorsement. But he claims that he acquired title under an assignment, dated December 1, 1864, executed by Samuel Harding, Jr., by his attorney, William Martin Harding, transferring and assigning to him (Taylor) the amount due the assignor as prize-money for the capture of the vessels already named. It may be admitted that Taylor's title and claim would be good, if William Martin Harding had authority to execute this assignment. Had he such authority? Clearly not, as the evidence stands.

There are three letters of attorney, executed by Samuel Harding, Jr., to be considered. The first, dated July 25, 1864, authorized William Martin Harding to receive the amount due the principal for prize-money consequent on the capture of the "Greyhound" and the "Minnie," among other vessels, and to endorse and receive the money for all drafts or warrants, without power of substitution.

The second letter, executed in England, October 27, 1864, empowered the same attorney to receive the amount due the principal for prize-money for the capture of the "Greyhound," with power of substitution and revocation.

The third was executed in this country, on February 4, 1865, and authorized William Martin Harding to receive the amount of the prize money due the principal on account of the capture of the "Greyhound" and the "Minnie," and this letter also contained authority for substitution and revocation. William Martin Harding had no color of authority, under these instruments, or any of them, to transfer the certificates in question to the claimant. His power was limited to the reception of the money from the Government, and did not extend to the assignment or transfer of the claim, or to the negotiation of the certificates. The

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Taylor's Claim.

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English cases of *Hogg vs. Smith*, and *Hay vs. Goldsmith*, (1 Taunton, 349,) are directly in point. The determination there was, that a letter of attorney to receive from the commissioners of the navy all salary, wages, &c., with a general power to receive all demands from all other persons, to appoint substitutes, and make due acquittances, did not authorize the agent to negotiate bills received in payment, or to endorse them in his own name.

The cases are illustrations of the general doctrine of the law of agency, that the authority of a special agent, appointed to do a particular act, must be limited to that act, and to such acts as are necessary to the performance of it. The attorney in the present case had power, perhaps, to endorse these certificates, if that was necessary to obtain the money from the navy agent at New York; but he had no power to endorse them for any other purpose; nor would the determination be different if the attorney had received from the claimant the full amount payable according to the tenor of the certificates. The Government could not even in that event pay the claimant, without incurring the liability of being answerable to the principal at some future time for the entire amount of the claim.

I am equally clear on the second point, that Taylor has no authority to receive the amount as agent for Samuel Harding, Jr. The paper called the assignment, to which I have already referred, purports to constitute the claimant the attorney irrevocable of Samuel Harding, Jr., to ask, demand, and receive the amount due, or to become due, as prize-money for the capture of the vessels before named.

Lord Coke says, that "where a man doeth that which he is authorized to do, and more, then it is good for that which was warranted, and void for the rest." (Co.-Litt., 258, a.) This rule, however, has, as Lord Coke also declares, "divers exceptions and limitations." It does not apply to a case where the boundaries between the excess and the rightful execution are not distinguishable. Then the whole execution is void. In the present case, the power of attorney to receive the prize-money was given by Wil-



*West's Claim.*

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liam Martin Harding as part security for the advance received from the claimant, and to effectuate the assignment of the demand against the Government. If the assignment is void, the authorization of the assignee to receive the money must be likewise void. The transaction must stand or fall as a unit.

In neither character is the claimant, in my opinion, entitled to demand payment of these certificates. He has no title to them, or the debts they represent, as owner. He has no authority to receive the money as agent of the payee. It is right, however, that I should say, in conclusion, that nothing has been brought to my notice in the case of Samuel Harding, Jr., which would justify the Government in refusing to pay the amount of the certificates to him or his attorney, if they should be presented for payment by one or the other. I have failed to discover that the legal effect attributed by the Second Comptroller to his intermarriage with the notorious "Bell Boyd," is supported by a correct view of any existing statute of the United States.

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

Hon. GIDEON WELLES,

*Secretary of the Navy.*

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**WEST'S CLAIM.**

The President has no authority, under the 11th section of the act of August 31, 1852, to allow the payment of an account of a United States Marshal for extraordinary expenses, without a special previous taxation of the proper district or circuit court.

ATTORNEY GENERAL'S OFFICE,

July 7, 1866.

SIR: I have the honor to return herewith the papers which were presented to you by William A. West, late United States marshal for the district of Nebraska, and which you referred to me on the 3d instant. The prin-

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West's Claim.

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cial document is a copy of an account on file in the office of the Comptroller of the Treasury, charging the United States with a balance of \$4,339 75. This balance is composed of three items, the large one, being a balance stated in a prior account-current, of \$4,042 39. The other two items are, respectively, \$262 56 for compensation of marshal, and \$35 for contingent expense. I cannot understand the object of Mr. West in calling your attention to the matter of this account, unless he supposed you had authority to direct its payment out of the judicial fund, under the act of 1852. If this be his view, it is certainly a most erroneous one. You have manifestly no authority to act upon the claim under that statute. I have taken pains to inquire at the proper offices as to the precise nature of the question between this person and the Government. I find that all the charges made in this account were disallowed or suspended by the accounting officers, for legal and sufficient reasons, and that no one of the items can be called an extraordinary expense, incurred by the claimant in executing the laws of the United States. So much of the claim as was for official compensation, was disallowed or suspended for want of the proper vouchers. This item amounts to several thousand dollars. Another item was for moneys paid jurors and witnesses. On investigating the matter, it was discovered that the marshal had allowed certain jurors and witnesses amounts greater than the law permitted, and of course his claim for the illegal allowances was rejected. He claimed a certain amount for expenses of a guard to prisoners, which it was found had never performed the services for which charge was made. He claimed his expenses for certain furniture purchased without the consent of the Secretary of the Interior, and therefore in violation of the act of 1853. This claim was accordingly rejected by the accounting officers. When I mention that two other items, purporting to be correct, balances from previous accounts, were rejected because they were manifestly erroneous, and not what they claimed to be, I have stated the character of the en-

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Case of General Gates.

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tire claim. The entire claim, if it had been just in law, and supported by proper proof, would have been duly allowed in the settlement of his accounts by the accounting officers. It is not, therefore, such a claim as is recognizable by the President under the act of 1852.

But, independently of the character of the demands embraced by the account, you cannot allow their payment under the act of 1852, because they have not been legally taxed according to the provisions of that law. The statute requires a "special taxation" of extraordinary expenses, payable by authority of the President out of the judicial fund. There has been no such taxation of the items of the present claim. The certificate of the district judge was given under the general law, for the purpose of vouching the account before the accounting officer, and not under the act of 1852, for the purpose of a special allowance of the claim by the President. The account, therefore, cannot be taken from the files of the Comptroller, and presented to the President under the statute of 1852.

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

The PRESIDENT.

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CASE OF GENERAL GATES.

A retired officer of the army is not entitled to the full pay and emoluments of his grade whilst not assigned to duty.

ATTORNEY GENERAL'S OFFICE,

July 9, 1866.

SIR: I have the honor to acknowledge the receipt of your letter of the 2d July, 1866, wherein you ask my opinion upon the points of law arising upon the report of the Adjutant General in the case of General Gates.

It appears that Brevet Brigadier General William Gates was placed upon the retired list, and afterwards assigned by Mr. Lincoln, late President, to active service, as command-

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Case of General Gates.

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ing officer at Fort Trumbull, in Connecticut. From this command he was relieved on the 25th of March, 1864. In June, 1865, General Gates was again assigned to special duty, and now makes claim for the difference in pay and allowances between the payments made to him when in retirement, and such as would have been made to him had he been retained in active service. Whether such claim can be allowed or not, depends upon the meaning of the 12th section of the act of Congress, approved 17th July, 1862, and entitled, "An act to define the pay and emoluments of certain officers of the army, and for other purposes."

This act authorizes the President, in his discretion, to place upon the retired list any officer of the army or marine corps whose name shall have been borne on the Army or Naval Register forty-five years, or who shall be of the age of sixty-two years, and to retire him from active service. And the President is authorized to assign any retired officer to any appropriate duty; and such officer thus assigned *shall* receive the full pay and emoluments of his grade *while* so assigned and employed. This language is so plain, that comment would seem unnecessary. The officer is to receive his emoluments and pay *whilst so assigned* and employed. When not assigned and employed, he can receive nothing more than the pay of a retired officer. The President is authorized to assign a retired officer to duty when he may deem it proper to do so, and may withdraw him from active service at his discretion. The President has power over the question, whether he shall be in active service or not; but, if in active service, the President cannot say that his pay shall be that of a retired officer, nor can the President say that a retired officer, not doing active duty, shall receive pay and emoluments as when assigned and employed. The President can only control the pay of a retired officer by assigning him to duty. The act contemplates that the retired officer may be off or on duty, at the discretion of the President, and he must be paid accordingly.

My opinion, therefore, is, that General William Gates,

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Claim of Beals and Dixon.

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being a retired officer, cannot claim the full pay and emoluments of his grade whilst he was not assigned to duty.

I am, sir, very respectfully,  
Your obedient servant,

JAMES SPEED.

The PRESIDENT.

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## CLAIM OF BEALS AND DIXON.

Beals and Dixon have no legal claim against the United States for an increase of prices under their contract of January 1, 1857.

ATTORNEY GENERAL'S OFFICE,  
July 9, 1866.

SIR: I have the honor to acknowledge your letter enclosing the following joint resolution of Congress, "Authorizing the Secretary of the Treasury to adjust the claim of Beals and Dixon against the United States."

*"Resolved, &c., That the Secretary of the Treasury is hereby authorized to cause the accounts of Beals and Dixon, for deliveries of material after May 1, 1861, under their contracts with the United States, to be adjusted and paid, allowing to said Beals and Dixon such additional prices for material delivered after May 1, 1861, as in his opinion they may be justly entitled to, under the provisions of their supplementary contract, dated January 1, 1857: Provided, That, in the opinion of the Attorney General, said Beals and Dixon have a legal claim upon the United States for an increase of prices under said contract. Approved May 2, 1866."*

On the 10th day of October, 1855, the Secretary of the Treasury, for and on account of the United States, entered into a contract with Beals and Dixon, by which Beals and Dixon bound themselves to furnish and deliver (wrought, fitted, and finished in a proper state to put into the building) all the material for the exterior walls of the south wing of the extension of the Treasury Building.

• The contract sets out with particularity how the stone is

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Claim of Beals and Dixon.

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to be dressed and finished, and agreeably to plans, models, and specifications, lithographed copies of which are made parts of the contract, the whole subject to such omissions, additions, and alterations as may be determined upon by the said party of the first part, the Secretary of the Treasury; and in case any additions, omissions, or alterations are determined upon, the same shall be specifically noted on the contract, and the amount to be paid or deducted therefor to be agreed upon and stated. The contract fixes various prices for the different grades of all of the contemplated work.

The stones were to be delivered from time to time, as required; but the whole to be delivered on or before the 1st day of October, 1857.

On the 1st day of January, 1857, the Secretary of the Treasury entered into another contract with Beals and Dixon, by which they engaged to furnish the material for the outside of the remainder of the building, and above the cellar walls. This contract is made by an endorsement on the contract of the 10th of October, 1855, and the material part of it is in these words: "It is hereby agreed, by and between the parties to the within contract, that the parties of the second part shall furnish the material required for the said extension, as above noted, in all respects as provided in the within contract, and at the same prices, and within a reasonable time; and any departure from these conditions or changes, increasing or lessening the cost of the material, and any and all differences growing out of this extension of the contract, shall be adjusted by the superintendent of the work upon *pro rata* principles, and the decision of the superintendent shall be final between the parties."

By order of the Department, all delivery was virtually stopped in March, 1859, and remained suspended until the 1st of May, 1861, when the work was resumed.

The contractors claim that, by the terms or legal effect of the contract, they are entitled to have an increase of

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Claim of Beals and Dixon.

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prices from the 1st of May, 1861; and I am asked whether they have such legal claim under the contract.

Of the loss that Beals and Dixon may have sustained, by reason of the long suspension of the work, I can have nothing to say. I am inclined to the opinion, that Congress intended that I should give construction to the contract without any reference to any extraneous facts. The resolution does not say that the work had been suspended, or by whom suspended, or why it was suspended. Whence comes my authority, then, under the resolution, to look at, or consider, any fact outside of the contract? and, if I can do so, how, and from whom, are the facts to be ascertained? I am to say whether there is a legal claim, under the contract, for an increase of prices, without being informed that any of the conditions of the contract have been changed, and, if changed, at whose instance, without being informed that any of the stipulations in the contract have been waived. The resolution assumes that the work was performed under the contract, without mentioning or suggesting the existence of a fact outside of, and independently of, the contract, that might produce a change in the prices mentioned in the contract.

This view of the scope and intent of the resolution, and which I take it is the true one, makes it my duty to say, that the prices mentioned in the contract cannot be increased.

But, assuming the facts hereinbefore stated to be true, I am constrained to come to the same conclusion.

The contractors claim that when the Government suspended the work, there was a departure from that condition in the contract which required the work to be done in a reasonable time, and that in such case the contract, by its very terms, authorizes the superintendent of the work to readjust the prices. Whether this is so or not depends upon the intention of the contracting parties, and their intention must be ascertained from the face of the contract, and without the aid of extraneous facts. Parties to con-

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Claim of Beals and Dixon.

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tracts cannot be presumed to have contemplated and provided for consequences that do not flow from their acts. Hence, when there was a departure from the conditions of the contract in this case, it cannot be that either party became thereby an insurer to the other against all possible losses from all possible causes. Such departure would authorize the superintendent to adjust the matter of difference so far, and only so far, as the changed condition caused a loss or gain. If the place of delivery was changed, thereby making the cost less or more, the superintendent could adjust that matter, because the change would directly diminish or increase the cost. But by a change of the place it does not follow that either party shall hereafter become the insurers to the other against all possible accidents, and especially the insurer against hazards that were not within the contemplation of the parties, and which hazards were not caused or increased or diminished by reason of any thing done by the parties. Take the case of a vessel loaded with stone lost at sea after the resumption of the works. The Government would not be responsible under the contract for the loss, because such loss could not be ascribed to the suspension. An increase of prices is demanded after the suspension because of the increase in the cost of labor and the diminution in the value of money, which occurred during the progress of the work. The great change in the cost of labor and the value of money was not caused by the suspension of the work under the contract; the suspension had no effect upon labor or the value of money. The suspension of this contract had no more to do with causing the great storm that affected prices and values, than it could have had in producing a storm that would wreck a stone-laden vessel of the contractors.

The contract does not expressly or by the most remote implication make any provision in regard to the fluctuations of the market. Such fluctuations are controlled by causes wholly independent of any thing that could have been done under this contract. The contracting parties each took the chances of such fluctuations. If labor be-



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Claim of Beals and Dixon.

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came scarce and prices high, the contractors have no legal ground of complaint, because, in by the contract, they assumed to do the work, no matter what might be the state of the market. It may be as well claimed that the parties agreed to make provision in regard to changes in the weather, as fluctuations in the market. If the contractors can change the prices because of the suspension, why can they not also change the quality, size, or work upon the stone to be delivered? The quality, size, and finish of the stone to be delivered are not more definitely fixed in the contract than the prices. The same end could be accomplished by putting less work in the stone as by increasing the prices for the required work. Indeed, as I understand the contract, when there should be a departure from the conditions or a change in the work, the superintendent, in making the adjustment therefor, was bound to do it upon "*pro rata* principles," that is, the rule of prices to be deduced from those fixed in the contract should govern him. This provision does in effect prevent his taking into consideration, when adjusting for departure from conditions or changes, any fluctuations in the market.

In every view of the case, therefore, I am of the opinion that Beals and Dixon have no legal claim upon the United States for an increase of prices under said contract.

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

Hon. HUGH McCULLOCH,

*Secretary of the Treasury.*

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Memphis Riots.

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## MEMPHIS RIOTS.

The National Executive Government has no authority to redress the private and public wrongs committed during the riots in Memphis, Tennessee, in May, 1866.

## ATTORNEY GENERAL'S OFFICE,

*July 13, 1866.*

SIR: Lieutenant General Grant's letter to the Secretary of War, of date July 7, 1866, which you have referred to me, with the papers that accompany that letter, show that the riots in Memphis, Tennessee, in the early part of May, resulted in most disgusting scenes of murder, arson, rape, and robbery, in which most of the victims were helpless and unresisting colored citizens. General Grant well remarks, that such a scene stamps lasting disgrace upon the civil authorities of the city of Memphis. Inasmuch as the civil authorities have thus far failed to arrest the perpetrators of these wanton outrages, or to do anything towards redressing the injuries and damages sustained, he asks whether the military shall interfere.

Whilst this conduct is so disgraceful to human nature, subversive of good order and peace, and derogatory to the dignity of the laws of the State of Tennessee, it constitutes no offence against the laws and dignity of the United States of America. Under our frame of Government, the States are charged with the duty of protecting citizens from outrage, by public prosecutions, and the citizens themselves have the right to appear in the appropriate courts, State or national, for the redress of any private wrongs that they may have sustained.

The military at Memphis performed their duty in aiding to suppress the mob violence. Having done that, they have and can have nothing to do with the redress of private grievances, or prosecutions for public wrongs. The courts, State and national, are open in Tennessee, and there is no war. Under the State laws, as well as the United

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Case of E. D. Morgan & Co.

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States laws, the injured party may appeal to the courts for redress.

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

The PRESIDENT.

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CASE OF E. D. MORGAN & CO.

The Secretary of the Treasury has power, after an entry has been made upon an invoice, believed by the importer to contain a true statement of the actual market value of the goods, to permit the importer, before payment of duties, to substitute another invoice, giving a less value, in case it appears affirmatively that the second invoice truly stated the actual market value, and that such true and actual value was not inserted in the original invoice by reason of mistake.

ATTORNEY GENERAL'S OFFICE,

July 14, 1866.

SIR: The question arising upon the application of Messrs. E. D. Morgan & Co., of New York, is, whether you have power, after an entry has been made at the custom-house of imported merchandise, on an invoice produced by the importer, and believed to contain a true statement of the actual market value of the goods, to permit the importer, before payment of duties, to substitute another invoice, giving a less value than that stated in the one originally produced, in case it appears affirmatively that the second invoice truly stated the actual market value of the merchandise, and that such true and actual value was not inserted in the original invoice by reason of mistake?

This is an important question of power, which I am not aware has been determined in any judicial or other authoritative exposition of the statutes. The precedents disclosed by the history of departmental action upon similar applications show, that the Department has exercised authority to allow manifest clerical errors occurring in invoices to be corrected before payment of duties. It has also permitted entries to be amended in cases where it appeared

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Case of E. D. Morgan & Co.

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that goods were invoiced by foreign manufacturers at prices greatly in excess of the general market values of similar goods, for the purpose of defrauding innocent consignees, by procuring large advances upon the merchandise. But the present application does not fall within either of these classes of cases. There was no such error in the invoice as could be properly called a clerical error; nor was the over-valuation of the goods an artifice made use of by the consignors for the purpose of deceiving or defrauding the importers. But the omission of the discount from the first invoice was caused by the mistake of the seller, in crediting the same to the purchasers in account current, instead of deducting it in the invoice.

The general doctrine is, that an act done under a mistake or ignorance of a material fact is voidable, and is the subject of equitable relief. In the present case, it is alleged that, although the purchasers of the merchandise were entitled to receive, and did in fact receive, from the seller, an allowance of a discount of one and a half per cent.; and the cost or value appearing in the first invoice, less such discount, expresses the true market value of the property at the place and period of exportation as provided by law; yet the purchasers were ignorant of those facts at the time they made their entry, and they accordingly claim that they are entitled to avoid the entry made under mistake or ignorance of material facts in regard to the value of the merchandise, and thus to obtain relief from the consequences of their act.

Has the Secretary of the Treasury power to grant their application? There is no authority explicitly conferred by any statute upon that officer to permit in any cases amendments of entries, corrections of invoices, or substitution of one invoice for another produced to the collector on the entry of merchandise at the custom-house. But is not such authority contained in, and derivable by, necessary implication from, the express power given to the Secretary of the Treasury by the act of September 17, 1789, to "superintend the collection of the revenue?" The grant has been

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Case of E. D. Morgan & Co.

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construed by the Supreme Court, and was held to embrace such powers, not prohibited by law, as are incidental to the general right of sovereignty relative to the subject-matter of the grant. (*Neilson vs. Lagow*, 12 How., 98.) If, therefore, the law does not prohibit amendments of entries in cases like the present, the power of allowing them being unquestionably incident to the general right of sovereignty, the Secretary of the Treasury, as superintendent of the agencies and officers of the Government engaged in the collection of the revenue, is invested with adequate authority to allow them.

We have already seen that, by the doctrines of general jurisprudence, acts done under mistake or ignorance of facts are voidable and relievable in equity. Assuming that the present is a case to which the general doctrine would apply, the only point remaining for consideration is, whether the statute law of the United States, expressly or by implication, prohibits the correction of mistakes, of the character contemplated by the principle mentioned, in the cases of invoices and entries of imported merchandise. If they do, an end is made of any question as to the power of the Secretary. If they do not, under the view already taken of the extent of the power conferred by the act of 1789, he has authority to grant relief in cases embraced by the general equitable doctrine already mentioned.

The proviso contained in section 7 of the act of March 3, 1865, (13 Stats. at Large, 494,) is supposed to present a bar to the granting of the present and every similar application. I do not so understand that proviso. It declares the duty "shall not be assessed upon an amount less than the invoice or entered value, any act of Congress to the contrary notwithstanding." This provision was intended only in the case where the actual, determined, entered, or invoiced value of goods shall be greater than the actual market value, as shown by the appraisement, to prevent the assessment of duties upon the appraised value, and to require in all such cases the assessment of duties to be made upon the entered or invoiced values, and not upon

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Case of E. D. Morgan & Co.

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the actual market values. It was intended to preclude any such construction of the enacting clause of the section as would allow the appraisement to prevail over the invoice, in case the latter disclosed a greater value than the former. The assessment of duties was required, therefore, to be made in every case on the basis of the higher value, whether that was shown by the invoice or the appraisal. This law is thus wholly irrelative to the case and question under consideration. If the Secretary of the Treasury has, under other provisions of law, power to allow the substitution of another and correct invoice for an erroneous one originally produced in any case, and he exercises that power in a particular instance, then the "invoice or entered value" of the goods, for the purpose of the assessment of duties, must be determined by the second invoice, and the entry as amended in conformity with it. We are remitted to the general statute under which the Secretary exercises supervisory jurisdiction over the collection of the revenue for a solution of this question of power. The authority conferred by that statute is sufficiently comprehensive, as I have already said, to include the power of relieving importers from entries made under innocent mistake or ignorance of material facts, affecting the value of their dutiable merchandise, by permitting, before payment of duties, the production and substitution of amended invoices, and the reformation of the entries in conformity thereto. It is scarcely necessary that I should observe, that this delicate power should be exercised always with the greatest care and circumspection, and that whether you will exert it in any particular case depends upon, and is to be left to, your sound discretion.

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

Hon. HUGH McCULLOCH,

*Secretary of the Treasury.*



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5. The same pay, bounty, and clothing, are allowed by law to persons of color, who were free on the 19th of April, 1861, and were enlisted and mustered into the military service of the United States between December, 1862, and the 16th of June, 1864, as are, by the laws existing at the time of the enlistment of such persons, authorized and provided for and allowed to soldiers in our volunteer forces of like arms of the service, 53.
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## GUANO ISLANDS.

1. The Secretary of State ought not to revoke the proclamation issued August 7, 1860, relative to Howland's island, in the Pacific ocean, in favor of the United States Guano Company, upon the application of the American Guano Company, 397.
2. The 8th section of the act of March 3, 1865, repeals that part of the act of August 18, 1856, which requires the trade in guano from guano islands to be carried on in coasting-vessels; and for two years from and after July 14, 1865, all persons who have complied with the act of 1856, section 3, may export guano in any vessels which may lawfully export merchandize from the United States, 514.

## INDIANS AND INDIAN TREATIES.

1. Where, under the treaty of May 10, 1854, between the Shawnee tribe of Indians and the United States, the missionary society of the Methodist Episcopal Church designated a person to whom the grant of land made in that treaty to the society should be confirmed, and such person applied ten thousand dollars to the education of the Shawnees, it was *held*, that the person so designated was entitled to a patent, although the society may have had an equity to the land prior to the treaty of 1854, 145.
2. The United States can rightfully make no treaty which would deprive the person mentioned of his right to the land. *Ibid.*
3. By the terms of the act of March 3, 1865, "making appropriations for the current and contingent expenses of the Indian department," &c., for the year ending June 30, 1866, the appropriations therein made for the relief and support of certain refugee Indians, and for payment of interest on non-paying stock held in trust for Indian tribes, can be rightfully drawn upon by the Secretary of the Interior before the commencement of the fiscal year ending June 30, 1866, 171.
4. Construction of the article of the treaty of January 13, 1855, with the Wyandott Indians, relative to the sale of lands allotted to the incompetent members of the tribe, 197.
5. No part of the amount appropriated by the act of March 3, 1865, for the benefit of the Miami Indians, can be paid to persons other than those embraced in the corrected list made by the Secretary of the Interior under the act of June 12, 1858, 384.

## ISTHMUS OF PANAMA.

1. The 35th article of the treaty of June 12, 1848, between the United States and New Granada, binds this Government absolutely to guaranty the perfect neutrality of the Isthmus of Panama, on the demand of the proper party; and this obligation must be performed by any and all means which may be found lawful and expedient, 67.
2. The 35th article of the treaty between the United States and New Granada does not oblige this Government to protect the Isthmus of Panama from invasion by a body of insurgents from the United States of Colombia, 391.

## INTERNAL REVENUE LAWS.

1. The fines imposed upon indictments and convictions under the 9th section of the internal revenue act of July 1, 1862, inure wholly to the United States, and the collectors have no right or interest therein, 62.
2. The offence created by the said 9th section can be tried and punished only by indictment, and not otherwise. *Ibid.*
3. The 1st section of the act of March 3, 1865, providing for the appointment of assistant assessors of internal revenue by the assessors is unconstitutional, 209.
4. The 16th section of that act, repealing all provisions of any former act inconsistent therewith, repealed so much of the act of June 30, 1864, as conferred on the Secretary of the Treasury the power of appointing, with the approval of the Commissioner of Internal Revenue, the assistant assessors. *Ibid.*
5. Under the circumstances, the President, since the passage of the act of March 3, 1865, is authorized to commission the assistant assessors. *Ibid.*
6. It is the duty of the President, before any judicial determination has been had of the constitutionality of the provision of the act of March 3, 1865, before mentioned, to exercise his constitutional power of appointment in the case of assistant assessors. *Ibid.*
7. Under the 14th section of the internal revenue act of June 30, 1864, the assessor has power, in all cases of false or fraudulent lists or valuations, to add the penal duty of one hundred per centum before the lists have  
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INTERNAL REVENUE LAWS (*Continued.*)

- been returned to the collector, but such power terminates on the transmission of such lists to the collector, 280.
8. The 98th section of the internal revenue act of June 30, 1864, imposes tax on sales at auction of Government property, 354.
  9. Bankers doing business as brokers are liable to pay, under the 99th section of the act of June 30, 1864, duties upon all their sales, whether for the benefit of themselves or of others, 432.

## JEFFERSON DAVIS'S CASE.

1. Reply of the Attorney General to the resolution of the Senate relative to the prosecution of Jefferson Davis for treason, 411.

## MARINE CORPS.

1. The enlisted men of the marine corps are not entitled to the bounty provided by the 5th section of the act of July 29, 1861, for the men enlisted in the regular forces, "100.

## MARSHALS.

1. A marshal must account for the fees which he earned and failed or neglected to collect, 455.
2. Without special legislation for his relief, a marshal cannot receive a credit in his accounts for fees which he was unable to collect by reason of the insolvency or non-residence of the parties. *Ibid.*
3. A marshal who may incur a greater expense than \$20 a year for furniture, without the previous authority of the Secretary of the Interior, cannot be allowed in his accounts the amount expended exceeding that allowance; and the same rule applies to the excess above \$50 for rent and improvements, when expended without such authority, 506.
4. The President has no authority, under the 11th section of the act of August 31, 1852, to allow the payment of an account of a United States marshal for extraordinary expenses, without a special previous taxation of the proper district or circuit court, 522.

## MARSHAL OF DISTRICT OF COLUMBIA.

1. The act of February 29, 1864, authorizing the appointment of a warden of the jail in the District of Columbia, deprives the marshal of the District of Columbia of the power of executing sentence of death upon any person imprisoned in the jail of that District under such sentence, 34.

## MEMPHIS RIOTS.

1. The national executive government has no authority to redress the private and public wrongs committed during the riots in Memphis, Tennessee, in May, 1866, 531.

## METEOR.

1. The district attorney should not be instructed, in this case, to consent to the bonding of the vessel, 444.

## MILITARY COMMISSIONS.

1. The persons charged with the assassination of the President in the city of Washington, on the 14th of April, 1865, may be lawfully tried before a military tribunal, 297.

## NATIONAL BANKS.

1. Letters from officers of national banking associations, employed as depositaries of public moneys, on business arising from that employment, are not transmissible through the mail, free of postage, to the Treasury Department, 23.
2. Such associations, employed under the 54th section of the national currency act of February 25, 1863, are "public depositaries" within the meaning of the act of March 3, 1857, chap. 114, and disbursing

NATIONAL BANKS (*Continued.*)

- officers may avail themselves of such associations, except for the deposit of receipts for customs. *Ibid.*
3. The provisions of the national currency act of June 3, 1864, (13 Stats., 99,) and the amendatory act of March 3, 1865, (*ibid.*, 484,) authorize the creation of banking associations, without the right to obtain, issue, and circulate notes, 334.
  4. These acts, while limiting the aggregate amount of bank-note circulation authorized thereby, place no restriction, either expressly or impliedly, upon the aggregate amount of the capital of banks which may be organized thereunder. *Ibid.*

## NATIONAL MILITARY AND NAVAL ACADEMY.

1. The charter of this association requires that a majority of the persons named therein shall accept the same, and such acceptance and organization of the company cannot be by proxies, 261.

## NAVIGATION LAWS.

1. The master of an American vessel sailing to or between ports in the British North American Provinces is required, on arriving at any such port, to deposit his ship's papers with the American consul, 72.
2. The act of August 5, 1861, does not change or affect the duties of masters of American vessels, running regularly by weekly or monthly trips, or otherwise, to or between foreign ports, as imposed by the act of February 28, 1803. *Ibid.*
3. If an American vessel is obliged by the law or usage prevailing at a foreign port to effect an *entry*, and she does enter conformably to the local law or usage, her coming to such foreign port amounts to an "arrival," within the meaning of the 2d section of the act of February 28, 1803, independently of any ulterior destination of the vessel, or the time she may remain, or intend to remain, at such port, or the particular business she may transact there. *Ibid.*
4. The provisions of the act of February 28, 1803, in reference to the deposit of ships' papers with American consuls, apply to American steam ferry-boats running between Detroit and Windsor, Canada West, 237.
5. Steamboats owned by citizens of the United States may be enrolled and licensed, although they may have been employed in the rebel service under papers issued by the rebel authorities, 359.
6. The master of a vessel is a "mariner," within the meaning of the 3d and 4th sections of the act of February 28, 1803, 458.
7. He is entitled, if a citizen of the United States, to three months' additional wages on being discharged in a foreign port, as in the case of a like discharge of any other seaman or mariner. *Ibid.*
8. The proviso of the act of June 28, 1864, was not intended to disqualify persons who are not citizens of the United States from becoming engineers or pilots on American steam-vessels carrying passengers, 488.

## NAVY AND NAVAL LAWS.

1. The 4th section of the act of July 16, 1862, chap. 183, does not authorize the appointment of an examining board to recommend the promotion or retirement of medical officers of the navy, 105.
2. Before a medical officer of the navy is placed on the retired list, under the act of April 21, 1864, chap. 63, it should appear that his case has been acted upon by both the boards provided for in that act, and that both of them failed to recommend him for promotion. *Ibid.*
3. If but one board has acted, and reported adversely upon the case of such medical officer, it is not the duty of the Secretary of the Navy to place him on the retired list. *Ibid.*
4. The act of June 25, 1864, (13 Stats., 183,) has the effect of removing from the retired list officers of the navy who were retired in pursu-

NAVY AND NAVAL LAWS (*Continued.*)

- ance of the act of December 21, 1861, but who are not liable to be retired by the provision of the act of 1864, 144.
5. Under the act of July 16, 1862, section 11, students or midshipmen at the Naval Academy are not entitled to be commissioned ensigns until they have performed the term of duty on ship-board prescribed by regulation of the Department, upon the completion of their academic studies, and passed their final examination on practical navigation and seamanship, 158.
  6. An acting master's mate is not a warrant officer of the navy, 251.
  7. The sentence of an acting master's mate, dismissing him from the service, by a court-martial convened by the commander of a fleet, may be lawfully carried into execution, on the confirmation of the officer ordering the court. *Ibid.*
  8. Neither the President nor Secretary has lawful authority to approve or disapprove the sentence in such a case. *Ibid.*
  9. If a sentence in such a case was in fact approved by the Secretary of the Navy, the President has no power, after the sentence has been carried into execution, to set aside the order of the Secretary and restore the party to service. *Ibid.*

## NAVY AGENT.

1. On the expiration of the commission of a navy agent, the office becomes vacant, unless a new appointment is made, 286.
2. Opinion of Attorney General Butler in case of Leonard M. Parker (2 Opin., 714) questioned. *Ibid.*
3. The sureties in the bond of a navy agent are liable only for his acts during the continuance of his commission. *Ibid.*

## PACIFIC RAILROAD COMPANY.

1. Authority of the several attorneys and agents of the Pacific Railroad Company to receive and assign the bonds deliverable to the company under acts of July 1, 1862, and July 20, 1864, 183.
2. Opinion of April 1, 1865, reaffirmed, 188.
3. The 4th and 5th sections of the act of July 1, 1862, and the 6th and 8th sections of the act of July 2, 1864, relative to the Pacific Railroad, require that the report of the commissioners, upon which the bonds are authorized to be issued to the company, shall be the result of the joint examination and judgment of the three commissioners, 414.
4. The Union Pacific Railroad Company, Eastern Division, cannot, after the expiration of three years from the date of the act of July 1, 1862, abandon the original route from Fort Riley to the 100th meridian, and claim the withdrawal from pre-emption, entry, and sale, of lands within fifteen miles of a proposed new route designated on a map filed in the Department of the Interior, 462.

## PARDONING POWER.

1. Where a fine was imposed on a person by judicial sentence, on conviction for crime against the United States, but the sentence was not enforced during the lifetime of the party, the President has power to remit the fine after his death, 35.
2. Commentary on the constitutional power of the President "to grant reprieves and pardons for offences against the United States, except in cases of impeachment," 227.
3. After condemnation of a vessel libeled in prize, the President cannot affect the decree by directing a discontinuance of the proceedings, 445.
4. The President cannot, by any exercise of his pardoning power, remit or mitigate the forfeiture of property confiscable as prize of war. *Ibid.*

## PAROLED PRISONERS.

1. The Government of the United States should not interfere with pro-

PAROLED PRISONERS (*Continued.*)

cess issued out of a State court in Kentucky for the arrest of "paroled rebel prisoners," charged with robbery on the occasion of Morgan's raid," 240.

PATENT OFFICE.

1. The increased compensation allowed to the employés of the Patent Office, for the fiscal year ending June 30, 1866, is not payable by virtue of the appropriation made by the 3d section of the act of June 25, 1864, making appropriations for the fiscal year ending June 30, 1865, 387.

PAYMASTERS' CHECKS.

1. Checks given by paymasters are valid obligations of the Government, although dishonored for want of funds to the credit of the officers who issued them, 216.

PENSION LAWS.

1. Eliza B Burr intermarried with Colonel Aaron Burr a revolutionary pensioner, and afterwards obtained a decree of divorce, absolutely dissolving the marriage. *Held*, that she was not entitled, on the death of Colonel Burr, to be placed on the pension-roll as his widow, 1.
2. A pensioner residing in an insurrectionary State, who did not take up arms against the United States, or give encouragement to the rebellion, is entitled, upon the termination of the hostile relation, to be paid the pension money due him from the time the rebellion began, 412.

PIRACY.

1. Robbery on the lakes is piracy within the meaning of our extradition treaty with Great Britain, but inasmuch as the parties engaged in the outrages on Lake Erie were guilty of robbery and assault with intent to commit murder, the Secretary of State was advised, in view of the disputed question of piracy on the lakes, that their extradition should be demanded, at the hands of the Canadian authorities, for those offences, 114.

POST OFFICE DEPARTMENT.

The Postmaster General, under a statute authorizing proposals for ocean mail steamship service between the United States and Brazil, accepted the bid of the "New York, Neuvinas, and Cuba Steamship Company," chartered to carry freight, passengers and mails between New York and Cuba. There were two other proposals for the contract. Afterwards all the stockholders of that company formed a new corporation, with power to carry the mails between the United States and Brazil, and obtained the assent of the Postmaster General to a change of the name of the company to that of the "United States and Brazil Mail Steamship Company." Six months subsequently to the award of the contract to the company, and after the formation of the new corporation, the next lowest bidder demanded that the contract be awarded to him, on the ground of defect of power on the part of the company to perform the contemplated service. *Held*, 1st, that the Postmaster General should have disregarded the proposal of the "New York, Neuvinas, and Cuba Steamship Company;" 2d, that he had no power to execute a contract with the "United States and Brazil Mail Steamship Company;" 3d, that the objection urged by the second bidder not having been made within a reasonable term, the contract could not be awarded to him or the third bidder; and, 4th, that in due execution of the act, the Postmaster General should invite new proposals for the service, 245.

2. A mail contractor cannot draw pay for services or work rendered or done prior to his taking the oath prescribed by the act of March 3, 1863, 498.

## PRESIDENT.

1. Under the act of March 3, 1857, requiring the Commissioner of the General Land Office to state an account between the United States and the State of Illinois of the "two per cent. fund," the State has no legal right to take an appeal to the President, and require him to state such account, after the refusal of the Commissioner of the General Land Office and of the Secretary of the Interior to comply with the law, 14.
2. The President is not an auditor or comptroller of accounts, nor the accountant general of the nation; but he may require an accounting officer, and other subordinate executive officers, to perform the duty imposed on them by statute. *Ibid.*
3. The Opinions of the Attorneys General, touching the relation of the President towards the administrative officers of the departments and bureaux, reviewed. *Ibid.*
4. The President has no duty to perform in respect to an application by the sureties in a bond given to the United States under the guano island act of August 18, 1856, to be released from their obligations in consequence of a breach of the bond by the principal, 30.
5. In 1864, a judge of a State court of Louisiana complained to the President that the Governor of the State (Hahn) had removed him, without notice or cause, from his office. *Held*, that the State judiciary had jurisdiction in the case, and that the President had no legal authority in the premises, 116.
6. A judgment entered on a bond given in place of a vessel seized for a violation of the act of July 7, 1838, chap. 191, is incapable of being affected by any action of the President, who cannot invalidate such judgment, or in any way impair its force and effect against the stipulators, 122.
7. The President has no general constitutional or statutory power to remit judgments obtained against sureties in recognizances taken in criminal proceedings before the courts of the United States, 124.
8. The act of June 17, 1812, authorizes the President to remit the forfeiture of recognizances taken in such proceedings in the District of Columbia. *Ibid.*
9. There is no statute under which the President may forgive, discharge, or reduce generally debts due to the United States. *Ibid.*
10. Where the President made a temporary appointment of a collector of internal revenue during a recess of the Senate, and no nomination was made during the next regular session or during an extra session called thereafter, it was *held*, that the President, after the adjournment of the extra session, might fill the vacancy by a second temporary appointment, 179.
11. Where a steamer was seized by a military force in an insurrectionary State, and remained in such custody till the termination of hostilities, without an adjudication by a court of prize, and without being turned over to a Treasury agent, it was *held*, that the President might lawfully restore the vessel to the owner, 484.

## PRIZE-MONEY.

1. The commander of a squadron is not entitled to share in prizes taken by a vessel of that squadron after he has transferred the command to his successor, although the captures were made in pursuance of instructions issued by such commander before the transfer of his command, 9.
2. The flag-officer of a squadron is not entitled to the share of prize-money accruing to the captain of his flag-ship from captures made by that ship while her captain was detached on account of illness, and the flag-officer was *de facto* in command of her. *Ibid.*
3. On a question as to the distribution of the proceeds of certain prize property captured by the United States steamer Santiago de Cuba, Captain Glisson, on the 29th and 30th of June, and the 1st of July,

PRIZE-MONEY (*Continued.*)

- 1864, it was *held*, that the capturing vessel was under the "immediate command" of Admiral Lee, as commander-in-chief of the north Atlantic blockading squadron; and that Admiral Lee was entitled, under the act of July 17, 1862, to one-twentieth part of the prize-money awarded to the vessel making the capture, 94.
4. The prize act of June 30, 1864, does not alter the rule of distribution of prize-money in cases of maritime captures pending at the date of the act, but the proceeds in those cases are distributable according to the law existing at the time of the captures, 102.
  5. The law regulating the distribution of prize-money among naval captors is a conditional grant by Congress, and as soon as the conditions are fulfilled the grant becomes absolute. *Ibid.*
  6. Commodore Wilkes, having, without authority, and in disobedience of the orders of the Navy Department, usurped command of the United States steamer Vanderbilt, cannot claim any share of the prizes captured by that vessel, 147.
  7. Commander Wyman cannot share in those prizes while acting under orders of Commodore Wilkes on board of that vessel. *Ibid.*
  8. Share of commander of capturing vessel, 148.
  9. The flag-officer, fleet-captain, and divisional commanders of a fleet are respectively entitled to the same interest in ransom-money, salvage, and bounty-money, accruing to any vessel of the navy, being one of a fleet or squadron, that they would have in prize-money in a like case, 326.
  10. An officer of a fleet absent with leave from the command to which he is attached, for the purpose of attending to his private affairs, is not entitled to share in prizes captured during his absence, 327.
  1. The prize-certificates issued to Samuel Harding, Jr., as acting ensign, cannot be paid in the hands of Walter Taylor, 519.

## PROVISIONAL STATE GOVERNMENT.

1. The military authorities of the United States in the State of Mississippi, during the existence of the provisional government therein established by the President, had authority to arrest and imprison a citizen for crime, and hold him in disregard of a writ of *habeas corpus* issued by the judge of a court appointed by the provisional governor, 322.

## PUBLIC LANDS.

1. A grant of public land by statute is the highest and strongest form of title known to our law. It is stronger than a patent, which may be annulled by the judiciary upon a proper case shown; whereas even Congress cannot repeal a statutory grant, 47.
2. The act of August 14, 1848, "to establish the Territorial Government of Oregon," vests in each religious society a perfect title to the land (not exceeding six hundred and forty acres) occupied by it in the Territory of Oregon on the day of the date of the act, as a missionary station among the Indians; and all that a claimant of land under that act is required to prove to establish a perfect title is, that upon the 14th of August, 1848, it did occupy the land as a missionary station among the Indian tribes in said Territory. *Ibid.*
3. The question of fact upon which the title of claimants under the act depends should be left by the Land Office to the decision of the courts. *Ibid.*
4. No executive officer has power to determine that question definitively. The claimant may recover the land in the courts even after a decision against them by the Land Office. *Ibid.*
5. The Land Office should refuse to issue a patent to claimants of land under the act of August 14, 1848, and thus decline jurisdiction of the questions of fact on which their title depends. *Ibid.*
6. The State of Minnesota, by the grant to her of sections 16 and 36 in

PUBLIC LANDS (*Continued.*)

- every township of public lands in the State, acquired no title to township sections 16 and 36 within the Sioux half-breed reservation, west of Lake Pepin, as against the holders of scrip issued to the half-breeds of the Sioux nation in exchange for their interest in the said reservation under the act of July 17, 1854, chap. 83, 59.
7. The Government, like an individual, has no power to withdraw or annul its grant of land. The first lawful grant must stand; and the second cannot operate as a conveyance, for the reason that the grantor, when he made it, had no estate to convey. *Ibid.*
  8. The Secretary of the Interior has no power, under the act of July 12, 1862, to set apart to the State of Iowa, from the public lands within her limits, an amount equal to so much of the alternate sections of public lands, in a strip five miles wide on each side of the Des Moines river, between its mouth and the Raccoon Fork, as was sold or disposed of by the United States at the date of the act of August 8, 1848, 453.
  9. The State of Iowa is entitled to the purchase-money of swamp lands within her limits, which were entered with cash prior to the passage of the act of March 3, 1857, 487.
  10. She is also entitled to indemnity in land for such swamp lands as were located with warrant or scrip prior to the passage of that act. *Ibid.*
  11. Congress had power to dispose of lands claimed by settlers upon the Soscol ranch, in California, under the pre-emption laws, at any time before the proof and payment required by those laws were made, 490.
  12. Settlement on the public lands of the United States confers of itself no right against the Government. It gives the settler, under the pre-emption laws, a right to enter the lands occupied and improved, when they are open to sale and he has complied with the laws in respect to proof of settlement and payment of the prescribed consideration. *Ibid.*
  13. Congress had power, as against persons who, before the passage of the act of March 3, 1863, had settled upon the lands in that ranch, but who had not perfected their right of entry, to confer upon claimants, under the Vallejo title, an absolute title to all the land purchased from Vallejo or his assigns. *Ibid.*
  14. It was the intention of Congress to enable any *bona fide* purchaser from Vallejo, whether resident or not of California who should prove that he had effected, either personally or through a tenant, settlement of part of the tract embraced by his claim, to acquire title thereto from the United States. *Ibid.*

## PURCHASE OF LAND.

1. An act of Congress appropriating a sum of money "for permanent defences at Narragansett bay" will not authorize the purchase, on account of the United States, of a tract of land as a site for a proposed fort at the place mentioned in the statute, 201.
2. Construction and effect of the 7th section of the act of May 1, 1820. *Ibid.*

## REBELLION.

1. United States property in the hands of persons within the jurisdiction of a friendly foreign State may be recovered by appropriate judicial proceedings instituted by the United States in the courts of the foreign Government, 292.

## REMISSION OF FORFEITURES.

1. The Secretary of the Treasury, and not the President, has power to remit the forfeiture of a vessel incurred by violation of the 2d section of the act of July 7, 1838, chap. 191, for the better security of the lives of passengers on steam vessels, 122.

REMISSION OF FORFEITURES (*Continued.*)

2. The Secretary of the Treasury has no power, under the 8th section of the act of July 13, 1861, to remit the forfeiture of a vessel or cargo, incurred under the law of war, on account of a breach of blockade, 439.

## SECRETARY OF THE TREASURY.

1. The Secretary of the Treasury has power, after an entry has been made upon an invoice, believed by the importer to contain a true statement of the actual market value of the goods, to permit the importer, before payment of duties, to substitute another invoice, giving a less value, in case it appears affirmatively that the second invoice truly stated the actual market value, and that such true and actual value was not inserted in the original invoice by reason of mistake, 532.

## SLAVERY IN MEXICO.

1. The so-called "protective regulations" established by Maximilian, as Emperor of Mexico, for the government of workmen brought into the country by immigrants, constitute a law for the enslavement of such workmen, 373.

## SOULÉ'S CASE.

1. Advice as to the action proper to be taken by the Government to secure the determination of the questions arising in that cause, 429.

## SURRENDER OF REBEL ARMY.

1. By the terms of the surrender to General Grant of the army under the rebel Lee, on the 9th of April, 1865, the officers of that army who resided before the rebellion in the loyal States, and went to Virginia or elsewhere and entered into the rebel service, are not entitled to return to their former homes in the loyal States, 204.
2. Persons in the civil service of the rebellion are not embraced by the terms of the surrender of that army. *Ibid.*
3. Officers of that army have no right after the surrender to wear their uniforms in public in the loyal States. *Ibid.*

## TRADE-MARKS.

1. State legislation on subject of trade-marks noticed, 352

















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